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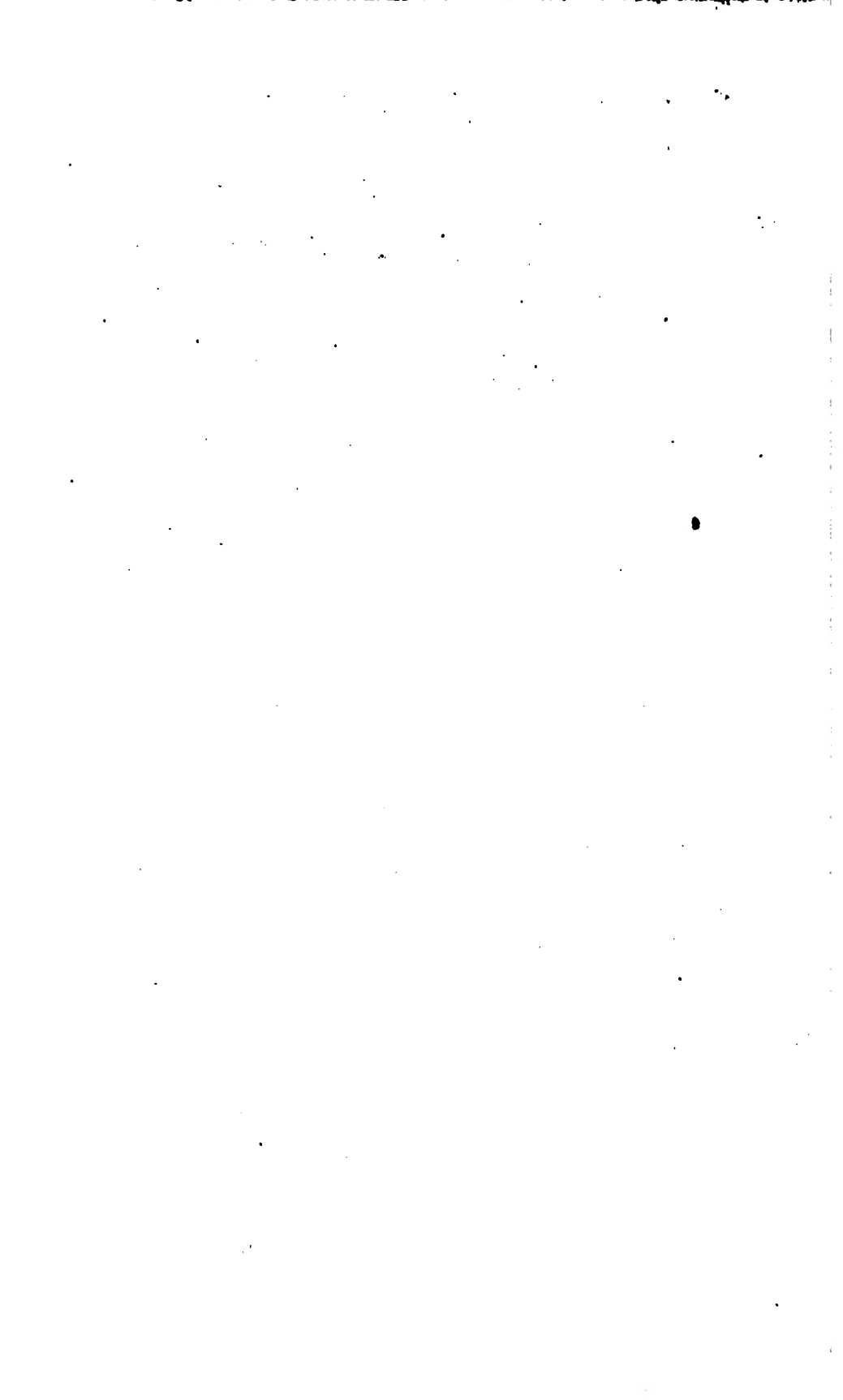
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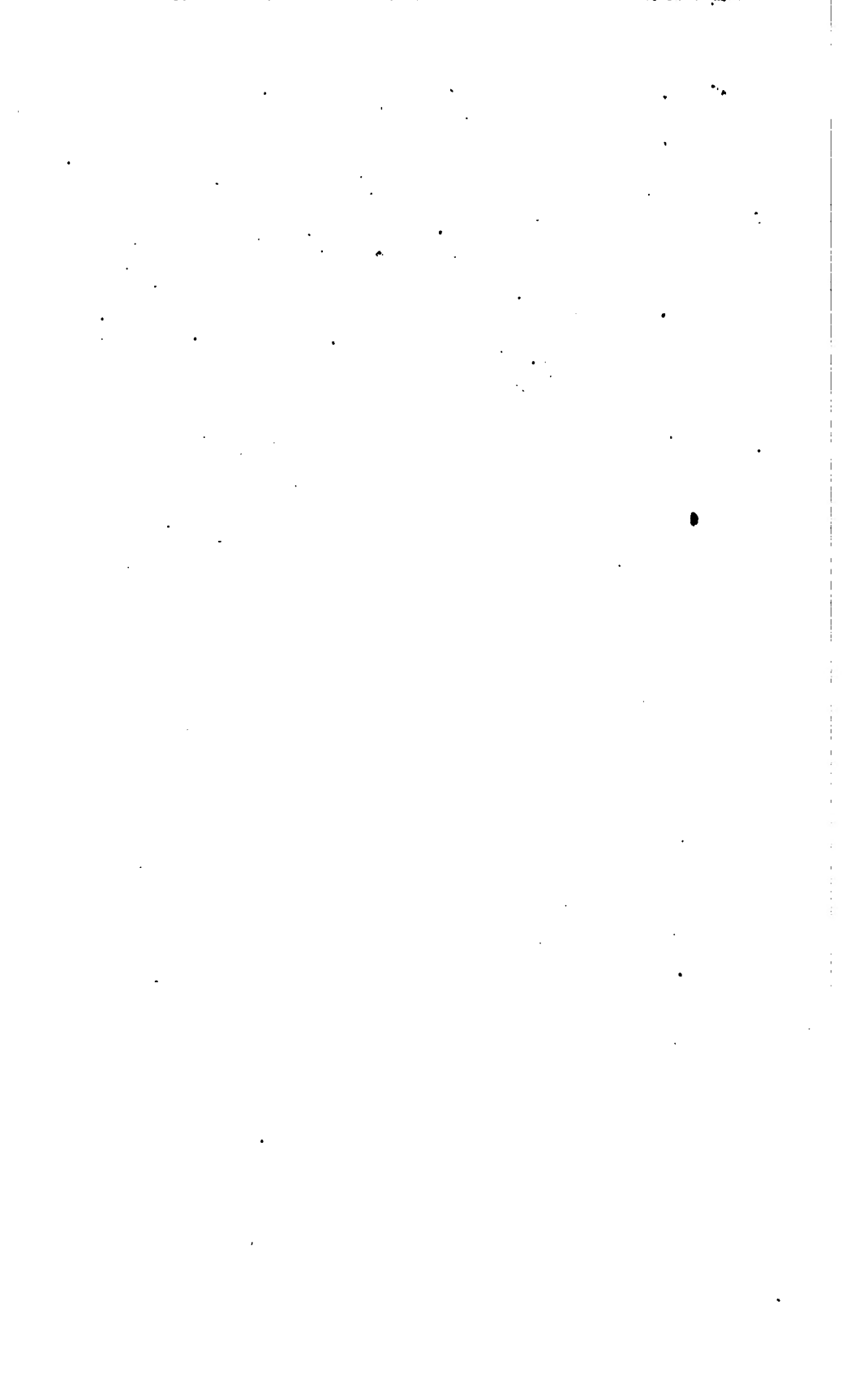


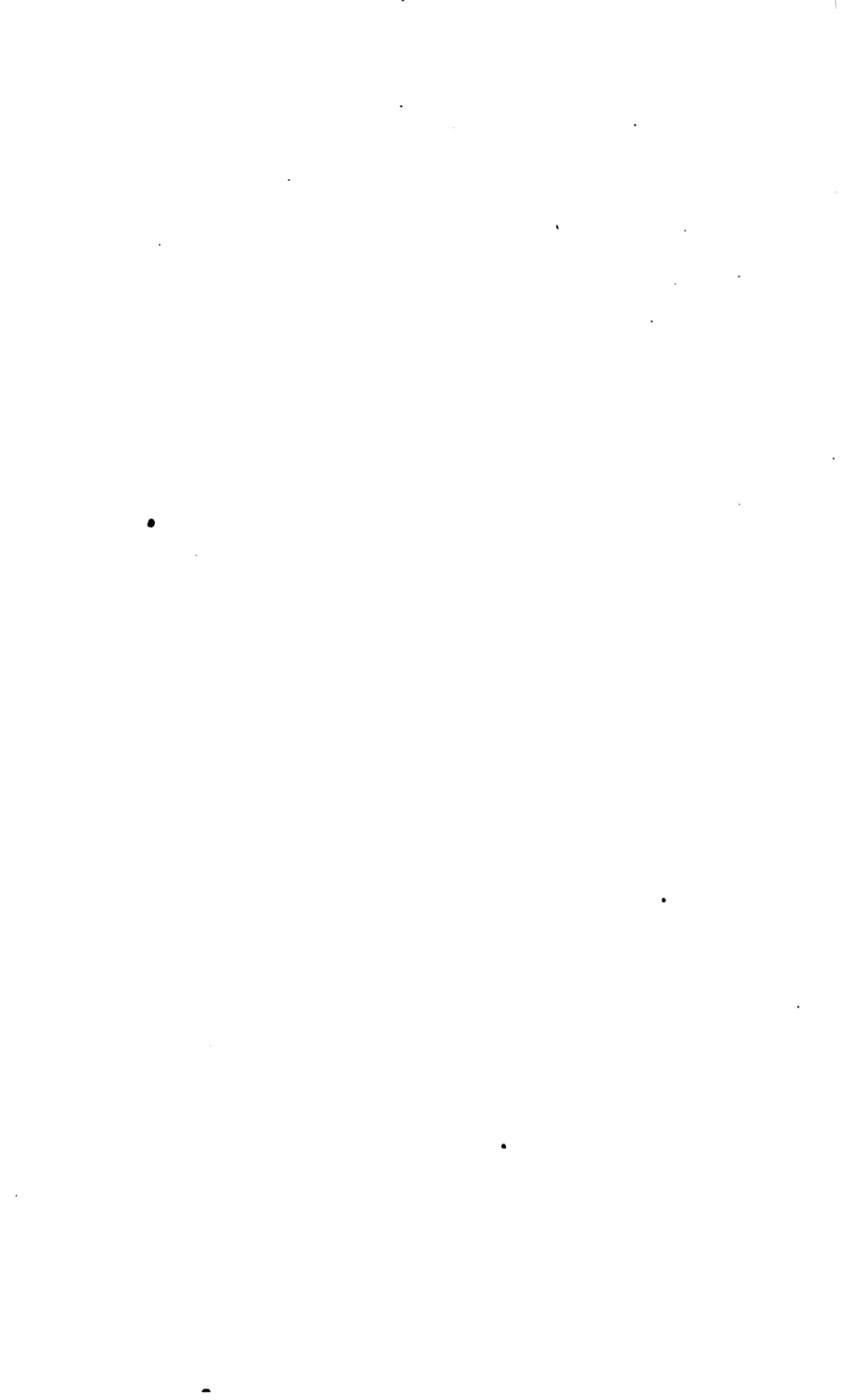
M. R. Elestropp.





M. R. Westropp.





NEW
REPORTS
OF
Cases
HEARD IN
THE HOUSE OF LORDS,
ON
APPEALS AND WRITS OF ERROR;
AND DECIDED
DURING THE SESSION
1836.

By RICHARD BLIGH, Esq.
BARRISTER AT LAW.

VOL. X.

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1838.

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REPORTS OF CASES
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HOUSE OF LORDS,
UPON APPEALS AND WRITS OF ERROR,
And decided during the Session 1836,

6th & 7th W. IV.

SLANE PEERAGE CASE. *

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Upon reference of a peerage claim to a committee of privileges of the House of Lords, the following facts appeared:

Richard le Fleming having accompanied Sir Hugh de Lacy to Ireland in the reign of Henry II., obtained a grant of the lands of Slane, in the palatine honour of Meath, of which Sir Hugh possessed the regalities; and Richard and his heirs and successors, tenants of the lands, were in ancient records styled Barons of Slane. In 3 Edw. 2. Baldwyn, Baron of Slane, was summoned to the parliament held at Kilkenny by writ directed Baldwyno le Fleming. After a succession of four peers of the family, who sat in parliaments during the reigns of Edw. 3., Hen. 4., and Hen. 6., Christopher, the fifth peer, died a bachelor, leaving two sisters; whereupon the lands of Slane went to David, his uncle of the half blood, who sat in parliament under a writ of summons, 2 Edw. 4. (1462), with the precedence of the old peerage. He was succeeded by his son Thomas, who died without issue, in 1471, leaving three sisters; whereupon the lands of Slane, with the other estates, went to his cousin, James Fleming, his male heir, who was summoned to and sat in parliament in the reigns of Edw. 4. and Rich. 3. (See stat. 12 Ed. 4.) He was succeeded by

* This case was argued in 1834, and decided at the close of the session 1835.

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Christopher, his son (1491), who sat in parliament 9 Hen. 7. He was succeeded (9 Hen. 8.) by his son James, who sat in parliament 41 Hen. 8., and died without issue, in 1577, leaving two sisters; whereupon the lands of Slane, &c. went to Thomas, his cousin and heir male. He was summoned to and sat in parliament 27 Eliz.; and from him, by descent through a female, George Bryan claimed the barony of Slane, as heir general of the three last of the Barons Slane, summoned by writ and sitting in parliament, upon the grounds that in the several instances where the male line failed, the dignity was in abeyance between the female heirs, and that the summonses and writs in those several instances operated as new creations of peerage, or as determinations of the several abeyances in favour of the party summoned, and constituted peerages in fee.

James Fleming claimed the peerage as heir male of Randall Lord Slane; he appeared by counsel only to oppose the claim of Mr. Bryan, not proceeding upon his own claim: The committee were of opinion and reported that Mr. Bryan had not established his claim.

IN the year 1827, a petition was presented to His Majesty by James Fleming, claiming the barony of Slane, as heir male of Randall Lord Slane, which was referred to Sir C. Wetherell, then Attorney-General, who heard evidence thereon, but made no report before he resigned his office. Mr. Fleming having left England in quest of evidence to support his petition, it was not then further prosecuted.

In the year 1829, George Bryan, of Jenkinstown, in the county of Kilkenny, Esq. presented a petition to the King, stating that Thomas Fleming, of Slane, in the county of Meath, Esq. titular Baron of Slane, on the 26th day of April, 1585, the twenty-eighth year of the reign of Queen Elizabeth, was summoned to the parliament held before Sir John Perrott, Knt. then Lord Deputy of Ireland, by the title of Lord Slane. That he died

without male issue the 9th November, 1597, leaving two daughters his co-heirs; Catherine, who became the wife of Pierce Butler, of the Old Abbey, in the county of Kilkenny, Esq. ancestor to the Lord Viscounts Galmoy, since attainted; and Elinor, who became the wife of her cousin, William Fleming, titular Baron of Slane, in the county of Meath; who, as heir male to her father, inherited his estates. This title went into abeyance between these two ladies.

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That Christopher Fleming, eldest son and heir of said Elinor by said William Fleming, was summoned to the parliament held in Dublin on the 18th May, 1613; and to that held there on 16th May, 1615: and it appears he sat in both. That by the summons of said Christopher to parliament, the abeyance of his grandfather's dignity of Lord Slane was terminated in his favour; or that a new peerage was created in the said Christopher by such summons, and sitting thereon.

That the said Christopher Lord Baron of Slane died in the year 1625, leaving six sons — First, Thomas, his eldest son and heir. Second — William, heir to his brother. Third — John. Fourth — Patrick. Fifth — James; and Sixth — Lawrence; which four last all died without issue.

Thomas Fleming, son and heir unto Christopher Fleming, during the lifetime of his father, became a professed friar in the parts beyond the seas; and that the said Baron of Slane did thereupon settle all his lands and hereditaments in the said kingdom, after his decease, upon William Fleming, his second son, and the heirs male of his body, with remainders, in like manner, to other younger

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brothers of the said William, wholly excluding the said Thomas, as not intending that he should succeed him either in his honour or fortunes; and thereupon King Charles the First, by letter dated in 1629, reciting the fact, and upon the request of Thomas, declared his royal will and pleasure to be, that the said William, and the heirs males of his body, should be from thenceforth, during the life of his said elder brother, reputed, styled, and called Barons of Slane; and that special care be had that, in all meetings and assemblies of parliament, or otherwise, where the said William should happen to be, or the heir male of his body, in case he die in the lifetime of his elder brother, he or they should have the same places and precedency which of right belonged to his father; but with this caution, that if the said Thomas Fleming should thereafter, quitting the habit and life which he had entered into, return unto his country, claiming the said title of honour, and the estates cast upon him by the law, that this declaration of the king's pleasure should be no ways prejudicial unto him.

William Fleming, the second son, under the foregoing authority, was allowed to take his seat in parliament, as appears by the journals of the House of Lords, on the 14th July, 1634, his brother Thomas being then alive. He married Lady Anne MacDonnell, daughter of Randall, Earl of Antrim, by whom he had four sons; first, Charles his heir; second, Randall, heir to his brother; third, Michael, who died unmarried; and fourth, Thomas, whose issue are extinct; and dying in 1641, was succeeded by his eldest son:

Charles Fleming, Lord Baron of Slane, who died unmarried, and was succeeded by his brother :

Randall Fleming, Lord Baron of Slane, who married two wives, first, Elinor Barnwall, daughter of Sir Richard Barnwall, of Crickstown, in Meath, Knight, by whom he had an only daughter Mary, who married, first, Richard Fleming, Esq. eldest son of Sir John Fleming of Staholmock, and secondly Oliver O'Gara, Esq. ; by the latter husband she had a son, Charles, who died unmarried, at Brussels, 1685. By her first husband, Richard Fleming, the said Mary had an only son, James Fleming, who died young and unmarried ; and an only daughter, Bridget, who became the wife of Randall Plunkett, eleventh Lord Baron of Dunsany, whose eldest son and heir, Edward, became twelfth Lord Baron of Dunsany, and left Randall, thirteenth Lord Baron of Dunsany, his son and heir, whose eldest son and heir is Edward, now fourteenth Lord Baron of Dunsany, heir general of Mary Fleming, eldest daughter of said Randall, Lord Baron of Slane.*

That the said Randall, Lord Baron of Slane, married as his second wife Lady Penelope Moore, daughter of Henry, first Earl of Drogheda, by whom he had three sons and one daughter ; first, Christopher his heir ; second, Henry, who died without issue ; and third, Randall, who also died without issue. The daughter was Alice, hereafter mentioned. Randall, Lord Slane, died 1676.

Christopher Fleming, Lord Baron of Slane, succeeded his father, and taking part with King

* This descent of Lord Dunsany and Charles O'Gara from the Hon. Mary Fleming has been found erroneous. See the Attorney-General's Report.

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James II. was outlawed for high treason, and forfeited his honours and estates, but was afterwards restored in blood, but not to his estates, by an Act of the English Parliament in 1708. He married the daughter of Sir Patrick Trant, and dying, left an only daughter and heir, Ellen, who died unmarried, and was buried in the parish of St. Sulpice, at Paris, August 8. 1748, on whose death the peerage of Lord Baron of Slane went into abeyance between the heirs of Mary and Alice, the two daughters of Randall, Lord Baron of Slane. The descent of Mary the elder has been herein-before recited.

Alice Fleming, only daughter of said Randall, Lord Baron of Slane, by his second wife, became the wife of Sir Gregory Byrne of Tymogue, in the Queen's County, Bart., by whom she had several sons. Charles, the eldest, married, and had several children, who all died without issue; and Henry Byrne, the second son, left an only daughter and heir, Catherine Xaveria, who became the wife of George Bryan, of Portland Place, London, Esq., by whom she had George Bryan, now of Jenkinstown, in the County of Kilkenny, Esq. her only surviving son and heir (the petitioner), who is now sole heir of Alice, youngest daughter of Randall, Lord Baron of Slane, and as such one of the two co-heirs general of said Randall, Lord Baron of Slane, of his father William, Lord Baron of Slane, and of his grandfather Christopher, Lord Baron of Slane, summoned to parliament in 1613 and 1615, in whose favour was terminated the abeyance of the peerage created in his maternal grandfather William, Lord Baron of Slane, in 1584-5.

That the petitioner presented a petition to his

Majesty in May, 1828, praying, that as one of the co-heirs of the aforesaid Randall, Lord Baron of Slane, he might be allowed to produce evidence, and use such arguments as he should be advised for the protection of his rights before his Majesty's Attorney-General for England, to whom was referred the petition of Mr. James Fleming, who claimed to be, and has assumed the title, and calls himself Lord Baron of Slane, on the allegation that he is heir male of the Hon. John Fleming, uncle of the aforesaid Randall, Lord Baron of Slane, and as such, heir male of said Randall. That the petition was referred to his Majesty's Attorney-General, before whom the petitioner attended by his agents and counsel. That Mr. James Fleming closed his case before the then Attorney-General, and the petitioner proved his descent and co-heirship, but the then Attorney-General had not made a report thereon.

That Mr. James Fleming founds his claim on a ground altogether new and unprecedented, that there are peerages in Ireland originating previously to the introduction of either writs of summons or patents, which have always descended to the heirs male, and that this peerage of Slane is one of them; thus alleging a new point of law involving the rights and privileges of the ancient peers of the realm, and the laws affecting the same; a point which requires the most solemn investigation and decision.

That a claim involving the same question has been made to the title of Athenry, another ancient Irish title, which has been twice investigated, first before Sir John Copley (Lord Lyndhurst), and secondly before Sir James Scarlett, when they re-

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spectively held the office of Attorney-General of England, neither of whom had made any report thereon * : that the Attorney-General, Sir Charles Wetherell, having had the whole evidence in these claims for the title of Slane before him since August last, had not made any report thereon ; and as the petitioner was advancing in years, he was most anxious to have a question of such urgent importance to himself and his family decided by the highest and most competent tribunal ; and as the claim of Mr. James Fleming had already been before the House of Peers, and proceedings had been had before the committee of privileges of their lordships thereon ; and as all cases of claims to Irish peerages must eventually be decided by their lordships' vote, by a provision of the Act of Union :

The petition prayed that his Majesty would refer the petitioner's claim to the House of Peers, for their lordships' consideration and report, whether the said title be or be not a barony in fee by writ of summons descendible to heirs general ; and whether the same is or is not now in abeyance between the said Edward Lord Dunsany †, and the petitioner ; or to make such other order in the premises as to his Majesty's royal wisdom should seem meet.

This petition was referred to the Attorney-General, to consider and report his opinion thereon.

Upon this reference the Attorney-General made his report as follows : —

* Sir James Scarlett, when Attorney-General, afterwards reported on the Athenry claim.

† This was afterwards retracted, as an admission made upon mistake.

In humble obedience to your Majesty's commands, signified to me by the Right Honourable Robert Peel, one of your Majesty's principal secretaries of state, the 8th of June, 1829,—that I should take into consideration, and report upon the petition of George Bryan, of Jenkinstown, in the county of Kilkenny, Esq.—claiming to be one of the co-heirs of Randall, Lord Baron of Slane, of the kingdom of Ireland, and of his father, William Lord Baron of Slane, summoned to the parliament of Ireland, in 1613 and 1615, or in whose favour the abeyance of the peerage created in his maternal grandfather Thomas, Lord Baron of Slane, in 1585, was terminated.

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I have considered the said petition, and have been attended by the agent of the petitioner, who in the first instance stated to me:—

That the family of Fleming was descended from Richard le Fleming, who accompanied Sir Hugh de Lacy to Ireland, in the reign of King Henry the Second, and obtained a grant from him of the lands of Slane, in his palatine honour of Meath, in which the said Hugh possessed the regalities; and the said Richard, and his successors, for five generations, were Barons of that palatinate, and were styled in the ancient records Barons of Slane.

That Baldwyn le Fleming (son of Richard, son of Baldwyn, son of Stephen, son of Richard, son of the first-mentioned Richard le Fleming) having married a daughter of Simon de Geneville (second son of Geoffrey de Geneville, Lord of the honour of Meath in right of his wife Matilda, daughter and heir of Gilbert de Lacy, grandson and heir of Sir Hugh de Lacy, first Lord of the aforesaid honour of Meath), thereby became allied to the

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powerful family of Mortimer, Earls of March and Ulster ; the chief of which family, Roger de Mortimer, Earl of March, had married the heir of the Genevilles and Lacys, Lords of Meath, and was the King's Lieutenant in Ireland.

That in consequence of this connection, it is presumed, the said Baldwyn, Palatine Baron of Slane, acquired influence and importance, and was summoned to the parliament, held at Kilkenny on the octaves of the Purification of the Virgin Mary, the third year of King Edward the Second, not by the title of Baron of Slane, but by writ directed to him by the name of Baldwyno le Fleming.

That he was succeeded by his son, Sir Simon Fleming, Lord le Fleming, who sat in parliament in the reign of King Edward the Third, and he by his son Sir Thomas Fleming, third Lord le Fleming, who sat in parliament in the reign of King Henry the Fourth, and was succeeded by his son Sir Christopher Fleming, fourth Lord le Fleming, who sat in parliament in the reign of King Henry the Sixth, and was succeeded by his grandson Christopher, fifth Lord le Fleming, son of John, who died in his father's lifetime, who sat in parliament in the reign of King Henry the Sixth, and who dying unmarried, his two sisters, Anne and Amy, became his co-heiresses, between whom the peerage of Le Fleming went into, and is still in abeyance among their heirs, there being many descendants of both now in existence.

That the manor or barony of Slane being settled on the heirs male, and held of the Lords of Meath in *fee tail*, went to David Fleming, uncle of the half blood to the fifth and last Christopher Lord le Fleming ; which David was summoned to, and

sat in the parliament of King Edward the Fourth, by the title of Lord David Fleming, Baron of Slane, and thus became a peer by a new writ of creation. It appears he was allowed the precedence of the old peerage, but was placed after Sir Christopher Preston, Lord of Kells in Ossory, and of Gormanstown, which first title was inherited by the Prestons from a female, heiress of the Birmingham family.

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That this Lord David Fleming was succeeded by his only son Thomas Lord Fleming, who dying childless, the peerage created in his father became also in abeyance, between his three sisters, Anne, Margaret, and Elizabeth; among whose heirs it is believed to be still in abeyance.

That the manor of Slane being held as aforesaid, went to the heir male, James, son of William Fleming, second son of Sir Thomas Fleming, the third Lord le Fleming. This Sir James Fleming was also summoned to the parliament held in the twelfth year of King Edward the Fourth, and sat therein, and also in the parliament of King Richard the Third, by the title of Lord Baron of Slane. He was succeeded by his son Christopher, second Lord Baron of Slane, who sat in the parliament held in the ninth year of King Henry the Seventh; and he was succeeded by his son, James Fleming, Lord Baron of Slane, who sat in the parliament of the forty-first of King Henry the Eighth; and he dying unmarried, the peerage created by his grandfather, summons and sitting, went also into abeyance, between his two sisters Catherine and Elinor.

The foregoing statement was considered necessary, as the peerage now alleged, in the pe-

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tition to be in abeyance by the claimant George Bryan, in himself and Lord Dunsany, originated after the death of James, Lord of Slane, in 1577, without issue, and the abeyance of his peerage in his two sisters; the several new creations by writs to the person who inherited the estates of the family having induced an erroneous conclusion, that a different law from that of England governed the descent of Irish peerages.

Having made the foregoing statement, the claimant's agent proceeded to lay before me evidence in support of the allegations of his petition; with this difference, that he now claims to be the sole heir of the said Christopher Lord Baron of Slane, of his father Randall Lord Slane, and grandfather William Lord Slane, instead of being co-heir with Lord Dunsany, of the afore-said peers, as stated and claimed in his petition; and he accounts for this change of claim as follows: —

That Edward, the present Lord Dunsany, and Randall, late Lord Dunsany, having both alleged publicly that they considered themselves as heirs of Bridget Fleming, daughter and sole heir of Richard Fleming of Staholmock, Esq. eldest son of Sir John Fleming of Staholmock, Knt. co-heirs of the said Randall, Lord Slane, with the heir of Alice Fleming, only daughter of the said Randall, Lord Slane, by his second wife: And it also appearing in the pedigree of the said Randall, Lord Dunsany, which he produced to the House of Peers of Ireland, when he proved his right to his seat on the 4th March, 1785, that his grandfather Randall, Lord Dunsany, was married to said Bridget, daughter

of Richard Fleming, and that the said Bridget was grandmother to the said Lord Dunsany; and it appearing by other evidence, that said Richard Fleming was married to Mary Fleming, only daughter of said Randall, Lord Slane, by his first wife, Elinor Barnwall, the claimant believed that the said Mary was the mother of the said Bridget. But when it became necessary to prove the descent of the said Lord Dunsany from the said Mary, and searches were made for evidence to establish the same, there was found a bill filed in the Chancery of Ireland, by Michael Fleming, Esq. brother of the said Richard Fleming on the 27th January, 1724, against the said Lord Dunsany, and Bridget his wife, wherein the said Michael did aver; and in their answer, the said Lord Dunsany, and Bridget his wife, sworn by them on the 4th March, 1724, admitted it to be true that said Bridget was only daughter and child of the said Richard Fleming, and they further state that the said Bridget was entitled to the sum of 1000*l.*, as a portion, pursuant to a certain deed of settlement, made on the intermarriage of the said Richard with the Defendant, Bridget's late mother, deceased. By this discovery it was found that the said Bridget was not the daughter of the said Honourable Mary Fleming, who was then in life, and lived many years afterward, viz. to the year 1741, when she made her will; but that the said Bridget was daughter of the said Richard Fleming, by a former wife, and, consequently, that the pretensions of Lord Dunsany to be heir to the said Honourable Mary Fleming, and coheir of Christopher, Lord Slane, were groundless; and, therefore, that the said

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claimant, George Bryan, was sole heir of the said Christopher, Lord Slane; and his, the said claimant's, agent thereupon proceeded to substantiate these allegations by proof, and produced to me, first — An examined copy of the bill filed by the said Michael Fleming the 27th January, 1724, and of the answer thereto of the said Randall, Lord Dunsany, and Dame Bridget his wife, sworn on 4th March, 1724, from the Rolls Office of the Chancery of Ireland; by which the said Michael charges, and the said Bridget admits that she was the only daughter and child of the said Richard Fleming; and the said Bridget further states, upon oath, that she was entitled to 1000*l.*, by the settlement made on the intermarriage of the said Richard Fleming with her late mother deceased.

Secondly. — To prove that the Honourable Mary Fleming, widow of the said Richard Fleming, was living in the year 1724, and for a long time afterwards, there was produced to me an examined copy of a bill filed in the Chancery of Ireland by William Fleming, in the year 1730, and an examined copy of the answer of said Mary thereto; in which she states herself to have been the daughter of Randall, Lord Slane, and widow of Richard Fleming of Staholmock, and also widow of Oliver O'Gara, Esq. thus clearly establishing her identity, and her existence in the year 1731 — seven years after the period when Bridget, Lady Dunsany, states, upon oath, that her mother was deceased.

Having established these facts, the claimant's agents proceeded to produce the evidences in support of the allegations of his petition.

To prove that there was no patent creating

Thomas Fleming, or any other person of the name of Fleming, or of any other name, Baron of Slane, or Lord of Slane, there was laid before me an affidavit of Sir William Betham, Ulster King of Arms of all Ireland, to the effect that he had made strict search in the office of Record in the Tower of London, and in the Rolls Chapel, and in the offices of Record in Birmingham Tower, and the Rolls Office of the Chancery of Ireland, and the Records of the late Parliament of Ireland, in Dublin, where patents of peerage are recorded, and that he could find no such patent in any one of the said offices of Record, and that he verily believes that no such patent does now, or ever did exist.

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To prove that the journals of the House of Peers of Ireland do not exist before the year 1634, (and that therefore secondary evidence should be admitted to prove certain facts respecting the peerage,) an affidavit of Sir W. Betham, Keeper of the Records of the late parliament of Ireland, was produced, which states that the journals of the Irish house of Peers, previous to that period, have been lost or destroyed.

To prove that Sir Thomas Fleming was Lord Baron of Slane in the year 1585, there was produced an examined copy of an inquisitio post mortem, taken 9th February, 1597, at Ratoath in the county of Meath, after the death of Christopher Lord Slane, in which he is styled Thomas Dominus Baro de Slane.

To prove that the said Thomas was summoned to the parliament of Ireland, holden before Sir John Perrott, Lord Deputy, 26th April, 1585, there was produced an examined copy of a do-

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cument called a parliament pawn, from the Rolls office of the Chancery of Ireland, by which it appears that the Lord of Slane was the third Baron in the list of the parliament then summoned.

In order to make good the evidence next offered, it was urged that the journals of the Irish House of Peers, previous to the year 1634, being lost, and that Ulster King of Arms being the officer of that house whose duty it was to deliver in a correct list of the peers of Ireland, at the commencement of the first session of each parliament, a certified entry in a book, kept by that officer to assist him in the discharge of that duty, is the best evidence the case will now admit of in the absence of the original journals, especially as many of those entries of lists of the peers present on certain days in parliament purport to have been copied from the original journals so far back as the reign of King Charles the First, and are all certified by the signature or initials of Thomas Preston, then Ulster King of Arms; and that this book should now be received as evidence of the facts therein entered, as to the enumeration of the lords present in the said parliaments: and therefore —

To prove that the said Thomas Lord Slane was present in that parliament, there was produced an ancient manuscript book from the office of Ulster King of Arms, entitled “Cases of Precedence,” containing a list of the peers of the said parliament, in which the word “Present” is placed after the name of “Dominus Slane.”

To prove that the said Thomas Lord Slane died on the 9th November, 1597, without male issue, and leaving two daughters, his coheirs, Elinor,

married to her cousin William Fleming; and Catherine, married to Peter Butler, Esq., there was produced the examined copy of the inquisitio before mentioned, taken at Ratoath, the 9th February, 1597; in which is the following passage: *Quod antedictus Thomas Dns Baro de Slane, diem clausit extremum ix° die Novembris anno Dni 1597 absque aliquo hered. mascul. de corpore suo exeunt. Et qd omnia et singul. terr. tent. et hereditamenta de quibus seisitus fuit, virtute chartæ predictæ, descendebant in remanerio Willo modo Dño Baron. de Slane, et quod dictus Willielmus tempore mortis predicti Thome, Domini Baronis de Slane, fuit ætatis xl. annorum, vel circiter, et maritatus; et ulterius dicunt jurati super sacramentum suum, quod prædictus Thomas nuper Dominus Baro de Slane, habuit exitus de corpore suo, legitime procreatus, duas filias, viz. Elinor, quæ modo prefato Willielmo Domino Baroni de Slane, maritata existit, et Katharina maritata Petro Butler, de old Abbey, in comitatu Kilkennixæ.*

It does not appear that the last-mentioned William, husband of Elinor the elder daughter, although styled in the inquisition Dominus Baro de Slane, ever was summoned to parliament; and it was stated that there was no parliament held in Ireland in the interval between the year 1597, when Thomas Lord Slane died, as above stated, and the year 1612, when this William died.

To prove that Elinor, the eldest daughter above mentioned, died on 24th January, 1616, and was succeeded by her eldest son and heir, Christopher, there was produced to me an original book of the funeral entries of the nobility and gentry of Ireland, from the year 1604 to the year 1622, in the

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office of Ulster King of Arms of all Ireland, which contains the following entry: "Elinor, dr. of Sir "Ths. Fleming, Knt., Lord Baron of Slane, died "y^e 24th of Januarie, 1616; she was wife to William Fleming Ld. Baron of Slane, and mother, "by him, to Christopher Fleming Ld. Baron of "Slane; also to George, Thomas, and James; "and to Mary, Jane, Elizabeth, and Ellis Fleming." "

To prove that Christopher Fleming was summoned to and sat in parliament, during his mother's lifetime, by the title of Lord Slane, in the year 1613, and 1615, there was produced the before-mentioned ancient MS. book from the office of Ulster King of Arms, called "Cases of Precedence," in which is an entry in the handwriting of and certified by Thomas Preston, Esq., Ulster King of Arms, purporting to be a list of those peers of Ireland, who were summoned to the parliament of Ireland, held 8th May, 1613, in which is the name "¶ Dns Slane;" and at the beginning are these words, "Copied out of the "journall booke:" and in another entry in the same book, is a list of the peers summoned to the parliament of Ireland, held in Dublin, 16th May, 1615, introductory to which, also, is the same remark, "Copied out of the journall booke;" and the following among the peers, "¶ Baro de Slane."

It was urged that the said summons by the title of Slane, then in abeyance between his mother Elinor and her sister Catherine Butler, was either a termination of the abeyance of the said title in his favour, or a creation of a new peerage in fee descendible to his heirs; it being, in the first case, similar to the summoning of the eldest son of a

peer by a title vested in the father, which on the father's demise would vest in the person summoned, in the latter, an absolute creation.

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To prove that Christopher Lord Slane died 9th June 1625, and was succeeded by his eldest son and heir Thomas, and that he had five younger sons, there was produced an examined copy of an inquisitio post mortem, taken at Navan, 13th January 1626, in which is the following sentence:—

“ Et ulterius dicunt juratores predicti super sacramenta sua, quod predictus Christopherus nuper Dominus Baro de Slane, obiit apud villam de Newstowne, nono die Junii 1625, et quod Thomas Flemynge, modo Dominus Baro de Slane, est ejus filius et heres, qui fuit etatis viginti et unius annorum, et sex mensium, tempore mortis predicti Christopheri patris sui et non maritatus. Et quod predictus Christopherus, nuper Dominus Baro de Slane, tempore mortis sui, habuit quinque filios, viz. Willielmus, Joh. Patric. Jacob. et, Laurenc. juniores, et tres filias, viz. Maria, Margaret, et Ellinor, quæ superstites sunt et non maritatæ.”

Thomas Lord Baron of Slane being a Roman Catholic priest, was disinherited by his father, by the settlement contained in his last will and testament. Whereupon application was made, by the said Thomas, to King Charles the First, to substitute in his room William Fleming, his next brother, by giving him the place and dignity of Lord Slane, as a peer of Ireland; and thereupon a king's letter was issued, dated the 30th October 1629, the fifth of that monarch's reign, of which an examined copy from the Rolls office of the

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Chancery of Ireland was produced to me, in the following terms : —

“ CHARLES R.

“ Right trusty and welbeloved cousins and
“ councellors, wee greete you well : Whereas wee
“ are informed Thomas Ffleminge, sonne and heire
“ unto Christopher Ffleminge, late Baron of Slane,
“ within that our Realme of Ireland, did, in the
“ life-tyme of his ffather, become and professe frier
“ in the part beyond the seas, and that the said
“ Barron of Slane did thereuppon settle all his
“ lands and hereditaments in the said kingdome
“ after his decease, uppon William Ffleminge, his
“ second sonne, and the heires male of his boddie,
“ with remainders in like manner to other younger
“ brothers of the said William, wholly excludinge
“ the said Thomas, as not intending that hee
“ should succeed him either in his honnor or
“ fortunes. Nowe for as much as wee are given
“ to understand that the said Thomas Ffleaminge
“ being resolved to persist in that course of pro-
“ fession, is not only content to relinquish and
“ leave unto the said Willam Fflemminge, his bro-
“ ther and heire, the honnor and title of Baron of
“ Slane, and all estates and fortunes which by the
“ lawes of that kingdom are descended uppon him,
“ but doth alsoe humblie desire that wee would be
“ graciously pleased to give way that, dureing his
“ life, his said brother William, and the heires
“ male of his body might be reputed Barons of
“ Slane. Wee takeing into our princely consi-
“ deracon, the maney services in former times
“ donne to our crowne, by the anncestors of the

“ said William ; and to nourish still that good dis-
 “ posicon in him of whom wee conceive good
 “ hopes, we are therefore gratusly pleased, and
 “ doe hereby declare our Royall will and pleasure
 “ to bee, that the said William and the heires male
 “ of his body, shall be, from henceforth, dureing
 “ the life of his said elder brother, reputed, stiled,
 “ and called Barons of Slane ; and further our
 “ pleasure is, that speciall care be had, that in all
 “ meetings, assemblies of parliament, or otherwise,
 “ where the said William Fflemminge shall happen
 “ to bee, or the heires males of his body, in case
 “ hee dye in the life-time of his elder brother, that
 “ hee or they shall have the same places and pre-
 “ cedency which of right belonged unto his father.
 “ But with this caution, that if the said Thomas
 “ Fflemminge shall hereafter, quittinge the habitt
 “ and life which he is now entered into, return
 “ into his country claymeinge the said title of hon-
 “ nor, and the estates cast upon him by the lawe,
 “ that this declaracon of our gracious pleasure,
 “ towards his said brother, shal be noe wayes pre-
 “ iudiciall unto him. Given under our signet at
 “ our pallace of Westminster, the thirtieth of Oc-
 “ tober, in the fifth yeare of our raigne.

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“ To our right trusty and right wel-beloved
 “ cousins and counsellors, Adam Vis-
 “ count Loftus of Ely, our Chancellor
 “ of our realme of Ireland, and Richard
 “ Earle of Corke, our Justices of our
 “ said realme of Ireland.”

“ Memorand. qd. vicesimo sexto die Novembr.
 “ Anno Dñi millesimo sexentesimo vicesimo nono
 “ Roland Plunkett, gener. venit' in Canc' Dñi Regis
 “ Regni sui Hibern. & petit lräs supradict' irrotular'

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“ ad cuius requisicoem irrotulant’ de verbo, in verb.
“ prout superius.

(Signed) “ R. WOGAN, Dy. Kr. of the Rolls.
“ Rolls Office, 16th May, 1829.”

To prove that this letter was not acted upon in the way pointed out by the king, but that the lord deputy took the opinion of the parliament on the question, who decided that the king’s deputy should issue a writ to the said William and his heirs, on the presumption that his brother Thomas was dead; with a salvo jure that in case the said Thomas was alive, the said William or his heirs should take no benefit of the said writ; and that the writ accordingly issued to the said William Fleming, and that he took his seat as a peer of the kingdom of Ireland in parliament thereon, — there was produced an examined copy of the following entry in the journals of the Irish house of peers : —

“ Die Lunæ 14 Julii anno regni Dni. Caroli 10 annoque
“ Dni, 1634°.

“ Memorandum. — That this day the Right
“ Honourable the Lord Deputy and the Lords
“ Spiritual and Temporal, being assembled in full
“ parliament, Patrick D’Arcy, Esq. of counsel,
“ with the Right Honourable William, Lord Baron
“ of Slane, humbly moved the Lord Deputy that
“ order might be given for the issuing a writ of
“ summons to the said Lord of Slane, as son and heir
“ unto Christopher, late Lord of Slane, and that
“ his lordship might take his place in this high and
“ honourable assembly of parliament, as his said
“ father, and his ancestors, Lords of Slane, have
“ heretofore done. Upon consideration whereof,
“ it is thought fit, and accordingly ordered by the
“ Lord Deputy, that the said writ shall be granted

“unto him, and that the said William shall take
 “his place, and have his precedency, as Lord of
 “Slane. But, forasmuch, as it appeared that
 “the said William had an elder brother, named
 “Thomas, who, in the lifetime of his father, about
 “fourteen years since, (as was alledged) went into
 “parts beyond the seas, from whence he is not yet
 “returned, and it appears not that he is living,
 “but is rather presumed to be dead : It is there-
 “fore ordered that the awarding of the said writ,
 “and the placing of the said lord, in the room of
 “his father, shall be with a salvo jure of the said
 “Thomas, in case the said Thomas be living and
 “returns ; and with this farther saving, that in
 “case the said Thomas be living, and that he, or his
 “heirs, shall at any time hereafter return into this
 “kingdom, and re-assume the title of Lord of Slane,
 “that then and in such case, the said William, or his
 “heirs, shall take no advantage or benefit by the
 “said writ or any consequent thereof, but shall be
 “altogether secluded from any such title, place,
 “or privilege, as he may claim by pretext of that
 “writ, as if the honour and favour now granted to
 “him had not been, or that no such writ had ever
 “been awarded to him : under such conditions
 “and salvos the said William did accept of the
 “said favour, and fully consented it might be en-
 “tered accordingly.” And also an examined copy
 of an entry on the said journals of the day follow-
 ing, to the following effect : — “Memorandum —
 “That according to an order of the Right Honour-
 “able the Lord Deputy, made in full parliament
 “on Mondaylast, the 14th day of this instant month,
 “his Majesty’s writ of summons was delivered to
 “the Right Honourable William, Lord Baron of

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"Slane, who was this day brought into this house
"by the Lords Howth and Dunsany, and the said
"writ allowed, and himself placed between the
"Lord of Kerry and the Lord of Howth."

It appears also by the Journals, examined copies of the entries in which were produced to me, that this Lord sat in parliament on several subsequent days in this month, and also on the 4th of November following, and frequently afterwards, and on the 6th of April, 1635, held the Lord of Enniskillen's proxy, and that on the 15th February, 1640, he made a motion respecting certain grievances, and the invasion of the privileges of the nobility. From all these entries on the journals, it is evident that the said William enjoyed and exercised the right of sitting in parliament, and that the effect of this writ and sitting was to give a new barony in fee to William Fleming and his heirs, and that it must still be considered as law, that the issue of writ, and the introduction as a new peer, although the crown awarded, and the house acquiesced in his taking his seat as of the old precedence, as Baron of Slane, was to all intents and purposes a new creation.

It appears also in Clanricard's Memoirs (folio, 1751, p. 139.), that Thomas Fleming, the friar, survived his brother William Lord Slane; for, in a letter dated at Portumna, in 1642, to the Lords Justices of Ireland, Lord Clanricard. states, that Sir Valentine Blake, and Thomas Fleming, a friar, brother to my Lord of Slane, and some others, were very active in the commotions in Galway in that year. William Lord Slane died in 1641, as appears by an inquisition taken at Navan 1676.

To prove that William Lord Slane died, and was

succeeded by his eldest son and heir Charles, and that the said Charles Fleming, Lord of Slane, died, unmarried, in 1661, and was succeeded by his brother Randall, who was restored to the estates of which his father had been deprived by the usurping powers, and married, first, Elinor Barnwall, and had an only daughter, Mary; and, secondly, Lady Penelope Moore, daughter of Henry Earl of Drogheda, by whom he had three sons, Christopher, Henry, and Randall, and an only daughter, Alice; and died in 1676, and was succeeded by his son Christopher,—there was produced an examined copy of an inquisition taken at Navan, 1676; by which it appears that said Lord William died in 1641, and was succeeded by his son Charles, who died in 1661, and was succeeded by his brother, Randall Lord Baron of Slane; and that the said Randall married, first, Elinor Barnwall, and had by her an only daughter, Mary; that he married, secondly, Lady Penelope Moore, daughter of Henry, first Earl of Drogheda, and had by her three sons, Christopher, Henry, and Randall, and an only daughter, Alice; that said Randall died in 1676, and was succeeded by his eldest son, Christopher Lord Slane.

To prove that this Christopher, Lord of Slane, was outlawed and attainted, and afterwards restored in blood, there was produced an examined copy of a private act of the British parliament of the seventh year of her late Majesty Queen Anne, cap. 53., by which act the said outlawry and attainder were reversed.

To prove that the said Christopher, Lord Slane, married Anne, daughter of Sir Patrick Trant, Bart., and had by her an only daughter, Ellen —

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there was produced to me an examined copy from the office of the Commissioners of His Majesty's woods and forests, in the Custom-house of Dublin, of a claim made before the trustees appointed under the Act made in the twelfth and thirteenth year of King William the Third, entitled "An Act for the granting an aid to his Majesty by the sale of the forfeited and other estates and interests in Ireland," by Sir Stephen Rice, Knt., for and on behalf of Ellen Fleming, only daughter of Christopher Lord Baron of Slane, begotten on the body of his wife, Anne, Lady Baroness of Slane, the daughter of Sir Patrick Trant, Bart., in which the following passage appears, viz. :—"That the said Lord Baron of Slane hath issue by his said wife, the said Anne Trant, the said Ellen Fleming, their only child."

Further, to prove that Christopher Lord Slane died without issue male—there was produced to me an examined copy of a bill filed in the Chancery of Ireland, the 13th November, 1730, by William Fleming, commonly called Lord Slane, against Michael Fleming, of Staholmock, Esq., Mary O'Gara, alias Fleming, widow, and others: and also examined copies of the answers of the said Defendants; in which bill it is stated, and in the answers of the Defendants it is admitted, that the said Christopher Lord Slane died without issue male.

To prove that Ellen or Hellen Fleming, only daughter of Christopher Lord Slane, died without issue, and unmarried, there was produced to me an examined extract of an entry made in the register of funerals of the parish of St. Sulpice, in Paris, now preserved in the Hotel de Ville in the same city, as follows :—

“ Extrait des Registres des Convois de l'Eglise

“ Paroissiale de Saint Sulpice, à Paris.

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“ Le huit du mois d'Août, de l'année mil sept
“ cent quarante huit, a été fait le convoi et enterre-
“ ment* de Helène de Flamming, fille agée d'envi-
“ ron cinquante ans, morte hier, rue Tournon, au
“ petit Hotel de Luxembourg, et y ont assisté
“ Messire Jacques Hector Chevalier de Macleane,
“ Baronet D'Ecosse, Sieur Georges Waters, Ban-
“ quier à Paris, Sieur Michel Bermingham, Maitre
“ en chirurgie des facultés de Paris, Londres, &c.
“ François Salomon Pothouin D'Huillet, ecuyer,
“ avocat au parlement, tous amis de la defunte, qui
“ ont signé.

“ BERMINGHAM.

GEO. WATERS.

“ MACLEANE.

POTHUIN D'HUILLET.”

There was also produced a paper, with another paper affixed thereto, found among the family deeds and papers of the claimant, purporting to be a copy of the same entry in the register of funerals of the parish of Saint Sulpice, signed by Borne, the vicar of that parish, 1st May 1789, with a notarial attestation as follows :—

“ Extrait des Registres des Convois de l'Eglise

“ Paroissiale, de Saint Sulpice, à Paris.

“ Le huit du mois d'Août, de l'année mil sept
“ cent quarante huit, a été fait le convoi et enter-
“ rement de tres haute et tres puissante demoisselle
“ Helene de Flamming, fille agée d'environ cin-
“ quante ans, morte hier, rue Tournon au petit
“ hotel de Luxembourg, et y ont assisté Messire
“ Jacques Hector de Mac Leane, Baronet d'Ecosse,
“ Sieur Georges Waters, Banquier de Paris, Sieur

* Tres haute et tres puissant demoisselle.

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“ Michel Birmingham, Maitre en chirurgie des
 “ facultes, de Paris, Londres, &c., Francois Salo-
 “ mon Pothuin d’Huillet, Ecuyer, avocat du Parle-
 “ ment, tous amis de la defunte, qui ont signé.

“ Delivré par moi soussigné Prêtre Vicair de la
 “ dite Paroisse, à Paris ce premier jour du mois de
 “ Mai de l’année 1789.

(Signé) “ BORNE, Vic.”

Then follows the notarial attestation, viz. :—

“ Pardevant les Notaires Royaux à Amboise
 “ sousignés.

“ Furent present M. Nicholas Mores, Chevalier
 “ Baronet, ancien Lieutenant Colonel du Re-
 “ giment de Blucley, Irlandois, Chevalier de
 “ l’Ordre Royal Militaire de St. Louis, et
 “ Milady Isabella Cameron de Lochyel, son
 “ epouse, demeurants à leur Hotel à Amboise,
 “ Paroisse de St. Denis.

“ Lesquels certifient à tous qu’il appartiendra,
 “ savoir le dit Sieur Mores avoir connu Made-
 “ moiselle Fleming, fille de tres haut et très puissant
 “ Seigneur Christophe Fleming, Lord Baron de
 “ Slane, Vicomte de Longford, Pair du Royaume
 “ d’Irlande ; et de Madame Strant son epouse, qui
 “ etoit fille de Mre. Patrice Strant, pour avoir vu
 “ la dite demoiselle Fleming, en l’ année mil sept
 “ cent quarante, chez sa parente Milady Clarfleu, à
 “ Boulogne sur Mer, ou elle étoit connue pour etre
 “ fille de Milord Slane, pour l’avoir vue depuis plu-
 “ sieurs fois à Paris chez le Sieur Georges de
 “ Waters Banquier.

“ Qu’il a oui dire que la dite demoiselle Fleming,
 “ etoit nièce du coté maternelle, de la Princesse

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“ d’Auvergne, qu’elle avoit eu proces, à raison de la
 “ succession de la dite Princesse d’Auvergne, sur
 “ laquelle succession elle avoit obtenu une somme,
 “ ou rente, à prendre sur l’Hotel de Bouillon à
 “ Paris; qu’il a oui dire aussi, que la dite demoiselle
 “ Fleming, etoit nièce de Madame Strant,* et petite
 “ fille du Chevalier Patrice Trant, de la ville de
 “ Dublin.

“ Qu’il a connoissance que la dite demoiselle
 “ Fleming a demeuré a Paris, rue Tournon, où il
 “ l’a connu, et où elle est morte d’une age fort
 “ avancée, sans avoir été mariée, qu’il croit que les
 “ papiers de cette demoiselle peuvent avoir été
 “ déposés chez le dit Sieur Georges de Waters,
 “ Banquier à Paris, ou chez le Sieur Abbé Crafort.

“ La ditte Milady Mores, qu’étant tres jeune,
 “ elle a oui dire par Milady Lochiel, sa mere, qu’elle
 “ avoit connu la ditte demoiselle Fleming, pour une
 “ personne très respectable et de grande consider-
 “ ation.

“ Dont, et de tout ce que dessus, les dits Sieur
 “ et Dame Morés, nous ont requis de ce que nous
 “ leur avons octroyé, fait passé a Amboisse, en leur
 “ hotel, l’an mil sept cent quatre vingt neuf, le
 “ dixieme jour d’Avril, après midi, ont signé apres
 “ lecture faite.

“ MORRES, Chevalier Baronet.

“ My LADI MORRES, née Cameron de Lochiel.

“ Scelle—BOUREAU. LEGENDRE.

“ GERBONN.

“ Conté à Amboise le dix Avril, 1789.

“ Rien que x sous.”

“ Nous, Nicholas Tournyer, Conseiller de Roy,
 “ president et subdelegue de l’election de cette
 “ ville, et lieutenant du duche pairie D’Amboise,

* Anglice, Trant.

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“ soussigné certifions, pour l’eloignement de six
 “ lieues du juge royal, que les Sieurs, Legendre et
 “ Bourreau, sont notaries royaux en cette ville, et
 “ que leurs signatures apposées au bas de l’acte
 “ cydessus, et de l’autre part, en foi de quoi nous
 “ avons delivré et signe le present en notre hotel,
 “ à Amboise, ce onze Avril, mil sept cent quatre
 “ vingt neuf. “ **TOURNYER.**”

To prove that such an act was done by the said parties, there was produced an examined copy of an entry in the bureau of the registration of civil acts at Amboise, in the department of the Indre et Loire, to the following effect :—

“ Extrait du Registre des Actes Civils Publics.

“ Du 10 Avril.

“ Du 10 Avril, 1789, Acte de notorieté par
 “ lequel, Mr. Nicolas Morres, Chevalier de St.
 “ Louis, et Milady Isabella Cameron, de Lochiel,
 “ son epouse, certifient avoir connu Mdle. Fleming,
 “ fille de haut et puissant Sgr. Christophe Fleming.
 “ Passé par Legendre, Not. à Amboise, le 10
 “ Avril, cont. un. Role.

“ Renvoi rien dix sous.

“ Pour extrait conformé delivré par le receveur
 “ de l’enregistrement et des domains.

“ **PIC. PARIS.**”

“ Amboise, le trois Decembre, 1829.

“ Nous soussigné, Maire de la Ville d’Amboise,
 “ certifions que la signature de dessus apposée, est
 “ bien celle de Mr. Pic. Paris, receveur de l’enregis-
 “ trement et des domains, à Amboise.

“ **TOURNYER.**”

To prove that Henry Fleming, brother of Christopher Lord Slane, died, without issue male—there was produced an examined copy of the same

bill, filed in 1730, against Michael Fleming, and the answer thereto; by which it appears that he died without issue male.

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To prove that he died unmarried, there was produced an original pedigree, in the hand-writing of the late George Bryan, Esq. deceased, father of the claimant; found also among the family deeds and papers of the claimant, and verified to be of the proper hand-writing of the said George Bryan, Esq. by the affidavit of Charles Butler, Lincoln's Inn, Esq. Barrister at Law, one of the executors of the last will and testament of the said George Bryan; in which it is stated that the said Henry Fleming died unmarried.

To prove that Randall, youngest brother of Christopher Lord Slane, died without issue — there was produced an examined copy from the aforesaid office of the Commissioners of Woods and Forests, of the claim of Sir Gregory Byrne, and Dame Alice his wife, before the aforesaid trustees; and also the claim of Michael Fleming, of Staholmock, before the same trustees; in which they state that Randall Lord Slane left issue male only the said Christopher and his brother Henry.

It was urged that the said Randall, the youngest son of Randall Lord Slane, although living at his father's death, as appears by the inquisition taken in 1676, and then aged three years, two months, and three days, must have died immediately afterwards, as his relations in 1700, who made these claims, said that Randall left only two sons, Christopher and Henry.

To prove that Randall Lord Slane had a daughter by his first wife, named Mary, — there was produced the claim of the said Sir Gregory Byrne,

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and Dame Alice his wife, before-mentioned, which contains the following passage : — “ The said Lord “ and Lady Slane died about twenty and four years “ since, and left issue two sons, to wit — Chris- “ topher and Henry ; and the claimant the late “ Lord had besides, issue one daughter called Mary, “ by his former wife.”

To prove that the said Mary (by the former wife) married Richard Fleming, son of Sir John Fleming of Staholmock, Knt., and had a son James, who died young, — there was produced to me an examined copy of the bill before mentioned, filed by William Fleming, commonly called Lord Slane, 13th Nov. 1730 ; and the answer of the said Mary thereto : in which bill it is averred that she did marry the said Richard, and had issue by him, a son James, who died young ; and in the answer of the said Mary, then the widow of Col. Oliver O’Gara, the same is admitted.

To prove that the said Mary had no issue by her second husband, Oliver O’Gara, — there was produced an examined copy of her will, dated 4th Nov. 1741, and proved the 21st June, 1742, from the Prerogative Office, in Ireland, in which she leaves all her property to her friends and servants, and does not mention any child or relative whatever.

To prove that said Lord Randall had by his second wife, Lady Penelope Moore, an only daughter, Alice, who became the wife of Sir Gregory Byrne, Bart., — there was produced to me the examined copy of the claim of said Sir Gregory Byrne, and Dame Alice his wife, before the trustees aforesaid, in which it appears that said Randall, Lord Slane, married Lady Penelope Moore, daughter of Henry Earl of Drogheda, and left two sons,

Christopher and Henry, and Dame Alice, the then claimant their only daughter.

To prove that the said Alice had, by the said Sir Gregory, four sons — Charles, Henry, Gregory, Christopher, and other children, there was produced to me an examined copy of a bill, filed 4th Jan. 1774, in the Chancery of Ireland, by Christopher Byrne, her fourth son, against George Agar, Esq. and others, with the answer thereto, in which it is charged and admitted, “ that Sir Gregory “ Byrne died in or about the month of March, “ 1712, leaving the said Alice, his widow—Charles “ Byrne, his eldest son and heir, by the said Dame “ Alice, then a minor under the age of twenty-one “ years—Henry Byrne, his second son—Gregory, “ his third son—and the suppliant, Christopher, “ his fourth son, by Dame Alice, and several other “ children.” There was also produced to me a document found among the papers of James Butler, of Kilmacargy, in Kilkenny, great grandson of said Christopher Byrne, purporting to be a case respecting the manor of Kilmocar, and referring to the said proceedings in Chancery, with the opinion of Philip Tisdall, Esq. Attorney-General of Ireland, and some time Judge of the Prerogative Court of Armagh, thereon, in which those facts also appear.

To prove that the said last-mentioned document was found among the family papers of said James Butler, and that the opinion thereon written, is in the handwriting of said Philip Tisdall, there was produced the affidavit of Sir William Betham, who received the same from the said James Butler, and proved the said handwriting to be that of Philip Tisdall.

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To prove that Charles Byrne, Esq., the eldest son of Sir Gregory and Lady Alice, died 13th April, 1750, leaving four sons — Dudley, John, Cæsar, and James — an examined copy of the aforesaid bill, filed 4th Jan. 1774, was again produced: by the contents thereof it appears, that the said “Charles Byrne died on or about the 13th “day of April, 1752, leaving Margaret Byrne, his “widow — Dudley Byrne, his eldest son and heir “— John Byrne, his second son — Cæsar Byrne, “his third son — and James Byrne, his fourth son “— and no other male issue.”

To prove that these four sons died without issue, the aforesaid bill of 4th Jan. 1774, was again produced, in which it appears that Dudley, the eldest son, died without issue in 1756 — John and Cæsar died in Germany unmarried — and that James was drowned in the Liffey in the year 1773, unmarried.

To prove that Mary, Anne, Margaret, and Frances, the daughters of Charles Byrne, died also without issue, there was produced to me the aforesaid case found among the family papers of said James Butler, Esq., wherein it is stated that they all died without issue.

The claimant's agent having thus proved the extinction of all the issue of Charles Byrne, Esq., proceeded to prove that the claimant, George Bryan, Esq., is the heir of the said Alice, Lady Byrne, through Henry, her second son.

To prove that Henry Byrne, Esq. the second son, as aforesaid, had an only daughter and heir, the document found among the family papers of said James Butler, Esq. was again produced, which states, that the said Henry Byrne left an only daughter and heir.

To prove that the said Henry Byrne, Esq. had an only daughter and heir named Catherine-Xaveria, who became the wife of George Bryan, Esq., there was produced the afore-mentioned pedigree, in the handwriting of the late George Bryan, Esq., and also a missal, or Roman Catholic mass book, of the family, in which is entered, in the handwriting of the said George Bryan, Esq. that he was so married at the parish church of St. Clements Danes, London, 9th Nov. 1762, to the said Catherine-Xaveria; and also an examined extract from the register of the parish of St. Clements Danes, Westminster, by which it appears that George Bryan, Esq. was married to Catherine-Xaveria Byrne, 9th November, 1762; and also,

To prove that he had a son Henry, who was born 9th March, 1764, and died 24th of the same month, there was produced the missal aforesaid, in which there is an entry to that effect.

To prove that the said George Bryan had a son Eustace Bryan, the same missal was produced, in which is an entry, in the handwriting of said George Bryan, to the effect that said Eustace was born 18th July, 1767.

To prove that said Eustace died unmarried and without issue, there was produced the act of administration to his effects, from the Office of Prerogative of the Court of Canterbury, dated April, 1789, and April, 1799.

To prove that the said George Bryan had another son George, the claimant, the missal aforesaid was produced, in which there is an entry to the effect that said George was born 3d November, 1770.

The claimant having thus proved himself sole

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heir of the body of Alice, Lady Byrne, heiress of her niece Helen, only daughter of Christopher, Lord Slane, and that he is, as such, now sole heir of the said Christopher, Lord Slane, of his father Randall, Lord Slane, and of his grandfather William, Lord Slane; on these grounds he claims that the title of Lord Baron of Slane is now vested in him:

Upon the whole of the case, I am of opinion, that there are strong grounds to conclude that the summons of Christopher, Lord Slane, and his sitting in the parliament of Ireland, held in the years 1613 and 1615, may be considered as a determination of the abeyance of the peerage created in Thomas, Lord Slane, by his summons and sitting in parliament in 1585 (supposing him to have so sat), in favour of the said Christopher, or as a new creation, descendible to his heirs; and that the said title, whether a new creation, or determination of the abeyance, was inherited by his eldest son Thomas, who, being a Roman Catholic priest, left no issue, but was presumed to be dead in the year 1634; and that the writ of summons in 1634, to William Fleming, the second son of Christopher, if not a new creation, upon the supposition that his eldest brother Thomas was then living, was a recognition of the title in him upon the death of that brother without issue, which title was therefore descendible to the heirs of the said William whether his brother Thomas had issue or not.

Upon consideration of the evidence produced, and having carefully examined each document, and finding and believing them all to be genuine and free from suspicion, I humbly offer it as my opinion, that the claimant, George Bryan, Esq. has proved himself the heir of Alice Fleming, the

younger daughter of Randall, Lord Baron of Slane, and that the said Alice was sole heiress of Hellen Fleming, only daughter and heiress of Christopher, Lord Slane. But, as there may be some question as to what was the effect and consequence of the said writs of summons, and some doubt as to some particulars of the evidence upon it, when it comes to be judicially investigated, I am humbly of opinion that this claim should be referred to the consideration and report of the House of Peers, if your Majesty, in your wisdom, should be graciously pleased to do so. (Signed) J. SCARLETT.

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The petition having been referred to a committee of privileges, the following history of the family of Fleming of Slane, in the county palatine of Meath, was drawn up and printed as explanatory of, and including, the case of George Bryan, and for the purpose of shewing the origin of the title, or denomination of Baron, in that family, to have been a palatine title, being the grant of Hugh de Lacy, Lord of Meath, to Richard le Fleming, in the reign of King Henry the Second, and not a grant from the king.

The case by way of introduction stated,—

That Baldwyn (or his son Simon) le Fleming, sixth palatine Baron of Slane, was created a baron of parliament, by the title of Lord le Fleming, by writ of summons and sitting in the reigns of King Edward the Second or Third, and that the title became in abeyance between the sisters and co-heirs of Christopher, the fifth Lord le Fleming, 36 Hen. VI.

That David, uncle to the said Christopher, the fifth Lord le Fleming, was created a baron of par-

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liament by writ and sitting in the reign of King Edward the Fourth, by the title of Lord Fleming of Slane, and that this title also became in abeyance among the three sisters and coheirs of his son Thomas, Lord Fleming of Slane, who died 8th December, 11 Edw. IV. 1471.

That Sir James Fleming, Knt. was summoned to parliament, and sat in the reigns of king Richard III. and Henry VII. and was thereby created a peer of parliament, by the title of Lord Baron of Slane, and that this peerage became in abeyance among the sisters and coheirs of his grandson, James, Lord Baron of Slane, who died without issue in 1577.

That Thomas Fleming was created a peer of parliament by writ of summons, by the title of Lord Slane (dominus Slane), and dying without male issue, his title became in abeyance between his two daughters, Elinor and Catherine.

That Christopher * Fleming, son of Elinor, the

* PEDIGREE OF THE BARONS OF SLANE, OF THE PALATINE LORDSHIP OF MEATH, PREVIOUS TO THEIR ELEVATION TO THE PEERAGE.

Richard le Fleming, son of Archibald Fleming, of Devonshire, attended Hugh de Lacy to Ireland and got a grant of twenty knights' fees in Meath, afterwards called the *Barony of Slane and Newcastle*. One of the Magnates, or Barons, of that palatine liberty.

Richard le Fleming, second Palatine Baron of Slane and Newcastle. =

Stephen le Fleming, living at the time of King John, third Palatine Baron of Slane and Newcastle. =

Baldwin le Fleming fourth Palatine Baron of Slane and Newcastle. =

Richard le Fleming, fifth Palatine Baron of Slane and Newcastle. = Maria Martyn.

Baldwin le Fleming, sixth Palatine Baron of Slane, summoned to Parliament by writ, 3 Edward II. first Peer of Parliament. (See Pedigree A. p. 42.) = Matilda, daughter of Sir Simon de Geneville.

elder daughter and co-heir, was summoned to, and sat in, parliament in 1613 and 1615, and was thereby created a peer of parliament (if the title of his mother's father, Thomas, Lord Slane, was not put virtually out of abeyance in his favour), and that this title is now vested in George Bryan, Esq., as heir general of said Lord Christopher.

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The case then proceeded, by way of argument in support of the claim, to give the following historical and genealogical memoir of the peerages which were alleged to have existed successively in the family of Fleming of Slane.

Stephen Flandrensis, who was living at the time of the Norman conquest of England, married the daughter and heiress of Ercenbald, Lord of Bratton, in Devonshire; his son and heir.

Archibald Flandrensis, or le Fleming, succeeded his father and mother, as heir of both, and was Lord of Bratton and Alverdescot in Devonshire.

Richard le Fleming, his son and heir, accompanied Sir Hugh de Lacy, the elder, to Ireland, and obtained from him the grant of the lands of Slane and Newcastle, in the lordship of Meath, which being a palatine honor, the lord thereof had power to give certain rights and liberties which constituted the grantee of the land, a baron, or magnate, of the said palatine honor. The original grant to Richard le Fleming is not, as far as has been discovered, extant, but those of other baronies of Meath have been preserved, by which it appears that some of those grants contained all liberties and free customs which the grantor was able to give, and in general terms constituted what was called a barony, or the most honourable fee in gift of the donor. Some of these baronies or manors were granted to heirs

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general, others in fee tail. It appears that this barony of Slane and Newcastle was held of the Lord of Meath, as of his manor Duleek, by the service of twenty-one marks for all service quando scutagium currit. This appears by an inquisition now in the Tower of London, taken after the death of Simon Fleming, Baron of Slane, in the 45th year of King Edward III. “Quod tenuit baroniam de “Slane et Novum Castrum de Bartholomeo “Burghershe, milite, de manerio suo de Dyveleke, “et quod quidem manerium de Dyveleke, tenetur “de Domino rege in capite per servitium viginti “marcarum.” &c. And in a statute of the Irish Parliament passed 12th and 13th Edw. IV. it appears that the manor of Slane and Newcastle were held in fee tail, by the service of a payment of money (a denier). Maurice Regan, the most ancient historian of the English invasion (secretary and interpreter to Dermot Macmurrough King of Leinster), says, that the service reserved by De Lacy from le Fleming was twenty knights’ fees, which is most likely correct, as it is well known that the tenants, in many cases, concealed their real services, and tendered much less than was due : which, once accepted, a precedent was formed which, in after ages, sanctioned the fraud and established it on record. Many instances of this are cited by Madox in his *Baronia Anglica*. Richard le Fleming built a castle at Slane : and in the *Annals of Tigernach*, under the year 1176, it is stated, that he defended it against the Irish who had besieged it. This Richard had, as before stated, a grant from De Lacy of the manor or barony of Slane and Newcastle in Meath, and thus became the first palatine Baron of Slane, and one

of the magnates of the lordship palatine of Meath. He had four sons: Richard, William, of Otterley Fleming, in Devonshire, Henry, and Lawrence.

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II. Richard, the eldest son, became heir to his father, and was the second Palatine Baron, or lord of the manor, or barony, of Slane, and was also lord of Bratton, Alverdescot, and Crediho, in Devonshire. His son and heir:—

III. Stephen le Fleming became the third Palatine Baron of Slane and Newcastle, as appears by the Plea Roll of the 1st and 2d of King Edward II. in Birmingham Tower; and on the Plea Roll of the 18th King Edward II. he is styled *proavus* to Baldwin le Fleming then Baron of Slane, and to have been seized of the lands of Astmananbeg.* He had two sons, Richard, who left a son Peter, and his son and heir:—

IV. Baldwin le Fleming became the fourth Palatine Baron, or lord of the manor, or barony, of Slane. Of him little more appears on record than his existence. He was succeeded by his son and heir:—

V. Richard le Fleming, fifth Palatine Baron, or lord of the manor, or barony of Slane. By the Memorandum Roll of the Exchequer of Ireland, of the 4th year of King Edward II. 1310, it appears that Baldwin le Fleming, son of Richard, Baron of Slane, made a charter of his lands of Newcastle. He married Mary, daughter of Nicholas Martin, of Darlington, in Devonshire, by whom he had a son and heir, Baldwyn.

* A. D. 1199. He gave King John 100s. for a writ de Morte Antecessoris, as appears by an entry on the Oblata Roll of the 1st year of that King.

PEDIGREE A.

FIRST PEERAGE CREATED BY WRIT.

LORDS LE FLEMING.

Baldwyn le Fleming, Lord of the manor of Slane in the lordship of Meath, one of the Palatine Barons of that lordship, was summoned to the Parliament at Kilkenny, 3 Edw. II. 1309, as *Lord de Fleming*. He was living 4 and 5 Edw. III. 1331, 1332. Pl. Roll. 4 and 5 Edw. III.

Matilda, daughter of Sir Simon de Geneville, Knt. second son of Geffery de Geneville, by Matilda, daughter of Gilbert de Lacy, son and heir of Walter, Lord of Meath, son of Sir Hugh de Lacy, the conqueror of Meath.

Sir Simon le Fleming, Knt. eldest son and heir, sat in Parliament in the reign of King Edward the Third, was placed after Sir Robert Preston, Lord of Kells, in Ossory, and Gormanstown, in Meath. Ob. 44 Edw. III. 1370.

Cecilia Champernon.

Sir Thomas le Fleming, Knt. third Lord le Fleming, aged 12 at his father's death, sat in Parliament 4th Henry IV. Ob. 30 Hen. IV. 1434.

Elizabeth, daughter of Sir Robert Preston, Lord Kells and Gormanstown.

Levita, daughter of Martin Ferrara. = Sir Christopher Fleming, fourth Lord le Fleming, had livery 16 Hen. VI. Ob. 30th Nov. 26 Hen. VI.

Elizabeth Wogan. = William Fleming, second son. See Ped. C. p. 53.

John Fleming, only son by first wife. = Anna Rochfort.

David Fleming, only son by second wife. For him and his issue see Pedigree B. p. 51.

Christopher Fleming, fifth Lord le Fleming, heir to his grandfather, sat in Parliament 29 Hen. VI. Ob. S. P. 36 Hen. VI. On his death, the peerage created by summons of Baldwyn, or Simon his son, and they, or either of them, sitting in parliament, became in abeyance between his two sisters, and is still in abeyance among their heirs. Their descendants are numerous.

Walter Dillon, Esq.

Anne Fleming, eldest sister and co-heir.

John Bellew.

Amia Fleming, second sister and co-heir.

VI. Baldwyn le Fleming, before mentioned, became 6th Palatine Baron of Slane. In an entry on the Plea Roll of the 12 Edward III. (1318) it appears that this Baldwyn le Fleming was seized of the lands of Ruscagh, and that Stephen le Fleming was his proavus. In an entry on the Plea Roll 1313, 7 Edw. II. Baldwyn le Fleming is styled Lord of the manor of Dromconerath in the county of Meath, and son and heir of Richard le Fleming, which fact also appears in an inquisition

taken at Exeter, 29 Edward I. This Baron of Slane married Matilda, one of the five daughters of Simon de Geneville, Lord of Culmullen, in the county of Meath, second son of Geoffry de Geneville, Lord of the palatine of Trim, or the moiety of Meath, by Matilda de Lacy, youngest daughter of Gilbert de Lacy, and with her sister Margery de Lacy (wife of Lord John de Verdon, Lord of the other moiety of Meath), were the coheirs of their grandfather Walter de Lacy, Lord Palatine of Meath, son and heir of Hugh de Lacy, first Lord Palatine of Meath. By this marriage he became connected with the noble and powerful family of Mortimer, Earls of March; for Roger Mortimer, Earl of March, married Joan, only daughter and sole heir of Peter de Geneville, Lord of Trim, eldest son of the before-mentioned Geffery de Geneville. Roger Mortimer became Lord of Trim; and his eldest son and heir, Edmond Mortimer, Earl of March and Lord of Wigmore and Trim, married Philippa, daughter and sole heir of Lionel Plantagenet, Duke of Clarence, by Elizabeth de Burgo, daughter and sole heiress of William de Burgo, Earl of Ulster, thus uniting those two great palatinates of Ulster and Trim, which together eventually vested in the crown, in King Edward the Fourth. From this match Baldwyn acquired greater influence and importance than was possessed by any preceding Barons of Slane, the cousin-german of his wife being married to Roger, Earl of March, Lord Justice of Ireland in 1317, 1319, and 1322, a nobleman of the first rank and influence in England, and possessing the sword of the sovereign in Ireland.

The barons of Ireland summoned in 1295 consisted of only twenty-nine individuals, while those

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summoned in 1309 to the Parliament in Kilkenny, 3 Edw. II. were eighty-seven, an increase or addition of fifty-eight in fourteen years! In Spenser's View of Ireland this is referred to distinctly; and we are indebted to that acute writer for the only light we possess as to the cause of this extraordinary increase in the number of the barons of Ireland, and the introduction of peerages by writ. The passage is as follows:—

“Eudoxius — You say well, for by the means of freeholders, their numbers hereby will be greatly augmented, but how shall it pass in the higher house, which still must consist of all Irish.”

“Iræneus — Marry, that also may be redressed by ensamples of that which I have heard was done in like case by King Edward the Third, as I remember, who being greatly bearded and crossed by the Lords of the Clergy, they being there, by reason of the Lords Abbots, and others, too many and too strong for him, so that he could not, for their frowardness, order and reform things as he desired, was advised to direct out his writs to certaine gentlemen of the best ability and trust, entitling them Barons, in the next Parliament, by which means he had so many Barons in his Parliament as were able to weigh down the clergy and their friends.”

Among these “gentlemen of the best ability and trust” in 1309 was Baldwin le Fleming, Palatine Baron of Slane, who was summoned to the celebrated parliament held at Kilkenny by (Sir John Wogan being Lord Justice of Ireland) King Edward II. by writ in the following words:—

“Rex, Baldwyno le Fleming, salutem — Sciatis super quibusdam arduis negotiis, nos et statum

“ terre nostre contingentibus, vobiscum habere
 “ volumus tractatum specialem, vobis mandamus
 “ quod sitis, in propria persona vestra, apud
 “ Kilkenniam, die lune, in octavis purificationis
 “ beate Marie, ad tractandum et parliamentandum
 “ cum Justiciario nostro Hibernie et aliis de con-
 “ cilio (nostro) et cum ceteris proceribus et mag-
 “ natibus terre nostre super eisdem negotiis. Et
 “ hoc nullatenus omittatis in fide que nobis tene-
 “ mini. Et habeas ibi hoc breve. Teste Johanne
 “ Wogan, Justic. &c. apud Dublin viii die Januarii,
 “ anno, regni nostri tertio.” *

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Similar writs were issued to Richard de Burgo, Earl of Ulster, and 86 other persons (hominibus), of whom Baldwin le Fleming was the 25th. It is to be observed that the writ is directed to Baldwin le Fleming, not to the Baron of Slane; his parliamentary title was therefore Lord Fleming.

No evidence has been discovered to shew that Baldwyn attended this parliament; and it is pro-

* This Baldwin had also a letter among other magnates of Ireland, “ de credentia pro Johanne de Hotham, ad Hiberniam “ destinato,” dated at York, 12th August, 1314, 8 Edw. II. directed “ Baldewino le Fleming.”

Again, 14th March, 1315.— “ Ad prelatos, proceres, et com-
 “ munitates Hiberniæ.”

Ricardo de Burgo, Earl of Ulster, &c. &c. &c.

Inter alios—

“ Baldewino le Fleming.”

Again, 4th Jan. 1317. — De Scotis in Hiberniæ reprimandis.
 Inter alios. “ Baldewino le Fleming.”

Again, 28th April, 1317. — De gestu laudabili, pro terra
 Hiberniæ continuando.

Rex Ricardo de Clare.

Edmundo le Botiller, Comiti Carrick.

Johanni fil. Thomæ, Comiti de Kildare.

Et inter alios—

“ Baldewino le Fleming.”

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bable that he did not, as Sir Robert Preston, the Lord of Gormanstown, had precedence of his son Simon, Lord le Fleming, in the following reign, as Lord of Kells, in Ossory, which title originated in the summons of William de Bermingham to the parliament held at Kilkenny before Roger Outlaw, L. J. in the 4th year of king Edw. III. 1330; he was attainted and executed for high treason in 1332, 6th Edward III., but his son Walter de Bermingham was afterwards restored to his estates, and had a grant of the manor of Kells, in Ossory, for life (which had escheated to the crown by the forfeiture of Lord Arnold le Poer), and sat in parliament as Lord of Kells; his daughter, Margaret, being sole heiress to her brother, carried all the estates, with the honor of Lord of Kells, to her husband Sir Robert Preston, aforesaid. It is therefore evident that this Baldwin, if he ever sat in parliament, must have sat subsequently to the sitting of Lord William de Bermingham, or Lord Walter de Bermingham, Lords of Kells. William de Bermingham was a younger brother of John, Earl of Louth.

Baldwin, Lord le Fleming, was the first Lord of Parliament of this family, not being summoned as Baron of Slane, but, as before stated, by his name only. In the Pipe Roll in Birmingham Tower, in the account of Roger Darcy, escheator, it appears that Baldwin le Fleming died seised of the burgh, barony, and town of Slane, in Meath, which he held of the heirs of Theobald de Verdon, as of their manor of Duleek, and that Simon was his son and heir, and had livery 24th Jan. 23d Edw. III. 1349. He died in the year 1335, 9th Edward III.

his wife, Matilda, surviving him; and was succeeded by his son and heir:—

Sir Simon le Fleming, Knt. Lord le Fleming, seventh Baron, or lord of the manor, or barony of Slane, and the second Lord of Parliament of this family, a minor at his father's death in 1335, as appears by the Plea Roll of the Court of K. B. in Bermingham Tower of 10th Edw. III. In 1347 he claimed certain liberties in his manors of Slane and Dromcondragh in the county Meath. "Simon fil. Baldwini le Fleming clamat habere has libertates, videlicet, mercatum in manerio suo de Salne (Slane) singulis septimanis anni, per unum diem, scilicet die lune, cum sak et sok, thol et them, et infangthef, thew, assisam panis, cervisii, et carnis, et hundredum, in manerio suo de Salne, cum pertinentibus, singulis annis, de quindena in quindenam, &c. clamat habere cognitionem placitorum, in manerio de Salne, vetiti namei, hutesie et clamoris, sanguinis effusionis." Rot. Plac. B. T. 21 Ed. III.*

He sat in parliament in the reign of Edward the Third, and was placed after the Lord of Gormanstown, Sir Robert Preston, also Lord of Kells, in right of his wife. This appears by acts of parliament of the 38th Hen. VI. 1460, and the 2d Edw. IV. 1462. This Lord Fleming married Cecilia, daughter of Thomas Champernon, of Modbury, in

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* Rot. Claus. 4 Ric. 2. No. 4. R. Johi fil. Rery, Esc. Hib. ad petic. &c. mand. quod Tho. filio et heredi Simonis Fleming, Baronis de Slane, defuncti, qui de manerio de Dyveleek, quod de rege tenetur in cap. obiit seisit. (de licentia E. nuper regis existen. nup, in man. Petri Houth et Hugonis Boice, Capill. ex dono Bartholomeo de Burghersh) de terris predictis plen. seisin. habere fac. 17 Oct.

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Devonshire, by whom he had Thomas, his heir, Reginald, and John. He died in October, in the 44th year of the reign of King Edward the Third, A.D. 1370, and was succeeded by his eldest son and heir, Thomas.

An inquisition was held at Slane, before Roger Hakenlow, escheator of Ireland, 45th Edw. III. (now in the Tower of London) 1371, to ascertain what lands this Simon held of Edmond de Mortimer, Earl of March, and Lord of Trim, who found as follows : —

“ Qui jurati dicunt super sacramentum suum
 “ quod Simon Fleming, Baro de Slane, nihil tenuit
 “ in dominio, neque in servitio, die quo obiit, de
 “ Edmundo, filio et heredi Rogeri de Mortuomari,
 “ nuper comitis Marchie, sed dicunt quod tenuit,
 “ die quo obiit, baroniam de Slane et Novum
 “ Castrum de Bartholemeo Burghershe, Milite, de
 “ manerio suo de Dyveleek, et quod quidem ma-
 “ nerium de Dyveleek tenetur de domino rege in
 “ capite, per servitium xxi. marcarum, de regali
 “ servitio, quando scutagium currit, pro omni ser-
 “ vitio, &c. &c. Et predictus Simon obiit die
 “ veneris, proximo ante festum exaltationis sanctæ
 “ crucis, anno domini regis nunc xlv. et dicunt
 “ quod Thomas Fleming est filius et propinquior
 “ heres etatis xii annorum et non maritatus,
 “ &c. &c.”

Bartholomew Burghershe married Elizabeth, daughter of Theobald Lord Verdon, lord of the moiety of Meath, and coheir to her brother John Lord Verdon, who died without issue, grand-daughter and coheir of Margery de Lacy, who was grand-daughter and coheir of Walter de Lacy, Lord of Meath, which Margery divided the lordship of Meath with her sister, Matilda de Geneville.

VIII. Sir Thomas Fleming, Knt. third Lord le Fleming, Palatine Baron, or lord of the manor, or barony, of Slane, and third lord of parliament, was twelve years old at his father's death, 1370, and in ward to Sir Robert Preston, Lord Gormanstown. He sat in parliament during the reign of King Richard the Second, being of age in the second year of his reign, 1378, as appears by the statute of 38 Hen. VI. and 2 Edw. IV., and was placed in parliament below the Lord of Gormanstown. In 1405, in a Plea Roll of 7 Hen. IV. he is stated to have been heir to his grandmother Matilda de Geneville. In 1407 he had a pardon for intrusion into his estates without livery. He married Elizabeth, daughter of Sir Robert Preston, Lord of Gormanstown, by whom he had, among other children, Christopher, his heir, and William hereafter mentioned, and dying 13 Hen. VI. 1434, was succeeded by his eldest son and heir :

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IX. Sir Christopher Fleming, Knt. fourth Lord le Fleming, ninth Baron, or lord of the manor, or barony, of Slane, and fourth peer of parliament. He did homage for his estate 15 Hen. VI. 1436, as appears by an entry on the Memorandum Roll of the Exchequer of Ireland of that year, and by an entry on the Great Roll of the Pipe of the 16 Hen. VI. 1437, it appears had livery. He married two wives, first, Levita, daughter of Martin Ferrars, of Beer Ferrars, in Devonshire, by whom he had an only son, John ; and second, Elizabeth Wogan, alias Fitzgerald, by whom he had an only son, David. He died 30th Nov. 26 Hen. VI. 1447, and was succeeded by his grandson :

X. Christopher Fleming, fifth Lord le Fleming, tenth Baron, or lord of the manor of Slane, and

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fifth peer of parliament, only son of John Fleming, only son of Christopher, Lord Fleming of Slane, by his first wife. This John Fleming died before his father, leaving issue by his wife Anna Rochfort, the said Christopher, heir to his grandfather, and two daughters, Anne and Amia: this Lord le Fleming died without issue, 1457, 36 Hen. VI.; and his two sisters became his co-heirs. An inquisition taken at Holdsworthy, in Devonshire, 12 Edw. VI. 1472, recites a deed made by Sir Christopher Fleming, and his son John, settling their English estates in Devonshire, of Bratton and Alverdescot, on the said Christopher for life, remainder to the heirs male of his body, remainder to his right heirs. The inquisition finds that he married first Levita Ferrars, by whom he had one son, John, and secondly, Elizabeth Wogan, by whom he had one son, David; that said John died before his father, leaving Christopher, heir to his grandfather, and two daughters, Anne, wife of Walter Dillon, and Amia, wife of John Bellew. That Sir Christopher died, and was succeeded by his said grandson, Christopher, who died without issue, and was succeeded by his uncle David, who married Alice Dillon, and had issue, Thomas, and three daughters, Anne, Margaret, and Elizabeth; that David died, and was succeeded by his son Thomas, who died without issue 11 Edw. IV. 1471, on whose death the settled Devonshire estates went to Anne Dillon and Amia Bellew, as right heirs of Sir Christopher, under the settlement. By an entry on the Close Roll in the Tower of London, it appears that those lands were divided between those co-heirs, 12 Edw. IV.

On the death of this Christopher, Lord le

Fleming, the fifth peer of parliament, the peerage created by the summons and sitting of his ancestors, Baldwin, or Simon le Fleming, went into abeyance between his two sisters, Anne Dillon and Amia Bellew, and it continues in that state to this day, among the heirs of those two ladies, of whose descendants there are many families extant. The palatine barony of Slane being held in fee tail, and the Devonshire estates being settled on the heirs male of the body of Sir Christopher Fleming, the fourth Lord Fleming, David, uncle to the last Lord, succeeded to both.

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PEDIGREE B.

SECOND PEERAGE CREATED BY WRIT.

PEERAGE OF FLEMING.

David Fleming (only son of Christopher, fourth Lord le Fleming, by his second— Alice wife) inherited the manor or barony of Slane, as heir male of his nephew Christopher, the fifth and last Lord le Fleming, who died without issue, and whose title went into abeyance between his two sisters. These ladies inherited the Devonshire property of the family. He was summoned to parliament (with the precedence of the old peerage), and sat 2 Ed. IV. 1462. An act of parliament passed to settle his precedence, and he was placed after Lord (Gormanstown) Kells. Ob. 3 Ed. IV. 1463.

<p>Thomas, Lord Fleming, was aged seven years at his father's death. Ob. s. p. 11 Ed. IV. 1471. On his death, the title created by the summons and sitting of his father, became in abeyance between his three sisters—the manor or barony of Slane, with the other estates, went to his cousin, James Fleming, his male heir. (See p. 53.)</p>	<p>Anne, coheir, s. t. 16, 1463.</p>	<p>Margaret, coheir, s. t. 15, 1463.</p>	<p>Elizabeth, coheir, s. t. 14, 1463.</p>
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XI. Sir David Fleming, eleventh Palatine Baron, or lord of the manor, or barony, of Slane, was summoned to Parliament, and sat therein 2 Edw. IV. by the title of Lord David Fleming, Baron of Slane; he is so described in the act of Parliament passed to decide the precedence between him and Lord Gormanstown. It appears that he was allowed, probably by the royal favour of his cousin

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King Edw. IV. the precedence of the original barony then in abeyance between his nieces. An act was passed that he should be placed after Lord Gormanstown, whose grandfather, Sir Christopher Preston, sat above Lord Thomas Fleming, Baron of Slane, and his great grandfather sat above Lord Simon Fleming, Baron of Slane. He died the year following, 1468, leaving an only son, Thomas, and three daughters, Anne, Margaret, and Elizabeth.

XII. Thomas Fleming, twelfth Palatine Baron, or lord of the manor, or barony, of Slane, and second lord under the summons and sitting of his father, died without issue, 8 Dec. 1471. On which the peerages created by the summons and sitting of his father, went into abeyance among his three sisters, Anne, Margaret, and Elizabeth. The statute 10 Edw. IV. c. 13. enacts, that Thomas Fleming, son of David Fleming, Baron of Slane, should have livery of the lands which his father died seized and possessed of, as if he had been of full age, without process, or inquisition, saving all rights.

On the death of Thomas Lord Fleming, Baron of Slane, the heirs male of the body of Christopher, the fourth peer, became extinct, and the Devonshire estates (excepting the manor of Crediho) reverted to Anne Dillon and Amia Dillon, right heirs of Lord Christopher the settler. But the manor, or barony of Slane, being held in fee tail, went to James Fleming, son of William, brother of Christopher Fleming, father of David, Lord Fleming, and Baron of Slane.

PEDIGREE C.

THIRD PEERAGE CREATED BY WRIT.

BARONY OR PEERAGE OF SLANE.

William Fleming, of Newcastle, in the county of Meath, Esq. second son of = Genetta
 Sir Thomas Fleming, third Lord le Fleming, by Elizabeth Preston. Rochfort.

Sir James Fleming, Knt. succeeded to the manor or barony of Slane = Elizabeth,
 on the death of his cousin Thomas, Lord Fleming, as cousin and heir daughter and heir
 male, that estate being held in *fee tail*. He was summoned to and sat in of
 parliament 12 Edw. IV. ; at least he is called a baron of parliament in Sir William Wells,
 an act 12 Edw. IV. He sat and signed a representation of the Irish Knight, Lord
 Parliament to Richard III. as *James Fleming, Baron of Slane*. Ob. Chancellor of
 7 Hen. VII. 1491. Ireland.

Sir Christopher Fleming, Knight, = Lady Elizabeth Sir George Thomas Fleming,
 second Lord Slane, aged eighteen at Fitzgerald, Fleming, of of Derpatrick.
 his father's death. Sat in parliament daughter of Stephenstown.
 9 Hen VII. Ob. 7th Aug. 9 Hen. Gerald, =
 VIII. Earl of Kildare. (See Pedigree D.)

James Fleming, third Lord Slane, aged nine at his father's Catherine, Elenor,
 death. Sat in parliament 41 Hen. VIII. and 2 Elizabeth. Ob. wife of coheir.
 20 Eliz. a. p. 1577, when the peerages created in his grandfather's Sir Christopher
 summons and sittings became in abeyance between his two sisters. Barnwell,
 The manor and barony of Slane went to his cousin and heir male, of Crickstown,
 Thomas Fleming. Knt. coheir.

XIII. Sir James Fleming, Knt. (the thirteenth Palatine Baron, or lord of the manor, or barony of Slane) was created a peer of parliament by writ of summons to and sitting in parliament during the reign of King Edward IV. He is, in the statute of the 12 & 13 Edw. IV. cap. 5., called a peer of parliament, and is by that act made sheriff of the county of Meath for one year, which county had hitherto a seneschal appointed by the lord of the palatinate, but being merged into the crown, a sheriff was made by act of parliament. He sat in the parliament held by the Lord Lieutenant of King Richard the Third, and after in the reign of King Henry the VII. The statute of 12 & 13 Edw. IV. cap. 17 and 18. states, that the manors of Slane and Newcastle were held in fee taile, and

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that James was heir male of Thomas, son of David, late Baron of Slane, and that Alice, widow of David, had a third part of the manor of Slane in dower.* It is rather extraordinary that this Act traces the pedigree of James incorrectly; it says, "that said James is cousin and heir male of Thomas, son of David, that is to say, the son of William, son of Sir Thomas, father of Sir David, father of Thomas;" when in fact the true pedigree is, "son of William, son of Sir Thomas, father of Christopher, father of David, father of said Thomas," as is proved by the inquisition at Holdsworthy, 12 Edw. IV. and other documents. This James succeeded to the manor of Crediho, in Devonshire, which had been formerly settled in taile male, and was not included in the settlement recited in the inquisition at Holdsworthy, 12 Edw. IV. He married Elizabeth, daughter of Sir William Welles, Knt. Lord Chancellor of Ireland, by whom he had three sons, first, Christopher, his heir, second, Sir George Fleming, of Stephenstown, Knt., and third, Thomas Fleming, of Derpatrick, in the county of Meath, Esq. He died 7 Hen. VII. 1491, and was succeeded by his eldest son.

XIV. Sir Christopher Fleming, Knt. (the fourteenth Palatine Baron, or lord of the manor of Slane) was aged 18 at his father's death. By an

* 1472 — Stat. 11 & 12 Ed. IV. c. 62. Licence of absence to James Fleming, Esq. Lord of Slane, and others.

Ibid. c. 73. — An Act that the King pass an *amoveas manum*, and restoration of James Fleming, Esq. Baron of Slane, to his lands.

Stat. Roll 12 & 13 Edw. IV. c. 18. — Act to remove the hands of the King from the lands of James Fleming, Esq. Baron of Slane.

Ibid. c. 19. — Act to enable said James to enter other lands.

entry on the Memorandum Roll of the Exchequer of Ireland, it appears he had livery of his estates, as heir of his father, 21 Hen. VII. 1505. An inquisition taken at Navan, 9 Hen. VIII. recites many deeds and settlements of Christopher, Lord Slane; and among them is one, founding a cell for friars, to pray for the souls of himself and family. By patent, dated the 13th Jan., 4 Hen. VIII. 1512, he was appointed Lord High Treasurer of Ireland, was summoned to the parliament which met 9 & 10 Hen. VII.; made a settlement of his estate in 1506, 22 Hen. VII.; and died 7th August, 9 Hen. VIII. By his wife, Lady Ellis Fitzgerald, daughter of Gerald, Earl of Kildare, he had an only son James, and two daughters, Catherine, who became the wife of Sir Christopher Barnwall, and Eleanor.

XV. James Fleming (the fifteenth Palatine Baron, or lord of the manor, or barony, of Slane) was aged nine at his father's death, 1519. By patent, dated 30 Sept. 32 Hen. VIII. 1540, he was made Lord Justice of Ireland. He sat in the famous parliament held the following year, in which Henry VIII. was made King of Ireland. His name also appears on the parliament pawn of the second year of Queen Elizabeth, 1559, among the peers who were then summoned to parliament. In an inquisition held at Ratoath, 40 Elizabeth, 1597, is recited a settlement of his estates made in 1568, first on himself, and the heirs male of his body; then on Thomas Fleming, son and heir of James Fleming, son and heir of Sir George Fleming, of Stephenstown, Knt. and the heirs male of his body. In default thereof, on William Fleming, of Derpatrick, son and heir of George Fleming, of the

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same, and his heirs male, remainder to the heirs male of Thomas Fleming, of Derpatrick, grandfather of said George.

This Lord James was twice married, first, to Lady Alice Fitzgerald, daughter of Gerald, Earl of Kildare, and secondly, to Ellis, daughter of Christopher Plunket, Lord Killeen. He died 20 Eliz. 1577, when the peerage created by the summons of his grandfather, Sir James Fleming, became in abeyance between his two sisters, Catherine, and Elinor, among whose heirs it is presumed still to remain. The manor of Slane, being settled on the heir male (being also held in tail male, could not, it is presumed, go otherwise) with the other estates, went to Thomas Fleming, of Stephenstown, son of James, son of Sir George Fleming, agreeably to the settlement of 1568, before recited.

PEDIGREE D.

FOURTH PEERAGE CREATED BY WAIT.

LORD BARON OF SLANE, CLAIMED BY GEORGE BRYAN, Esq.

JAMES, First Lord Slane. See Pedigree C. = Elizabeth Wells.

Sir George Fleming, of Stephenstown, Knt. = Elinor Butler. Thomas Fleming, of Derpatrick, = Mary in Meath, Esq. third son of James, Lord Slane. Cruise.
or Lord Fleming, of Slane.
See Pedigree C.

James Fleming, of Stephenstown, Esq. = Ismay Dillon. William Fleming, of Derpatrick. = Anne Eustace.
only son and heir.

Thomas Fleming, of Stephenstown, succeeded to the estates of Slane, &c. on the death of his cousin James, Lord Baron of Slane. Was summoned to parliament 1585, as Lord Slane, and sat that year. Ob. 9 Nov. 1597, when this peerage became in abeyance between his two daughters.
Catherine Preston. George Fleming, of Derpatrick. = Mary Cusack.

Pierce Butler, of Old Abbey, in Kilkenny, Esq. = Catherine, daughter and coheir. Elinor Fleming, daughter and coheir. = William Fleming inherited the manor of Slane, as heir male, on the death of Thomas, Lord Slane. Ob. 10 Jan. 1. 1612.

Christopher Fleming, son and heir, summoned to and sat in parliament, 1613 and 1615, as Lord Baron of Slane, by which the abeyance of the peerage of his maternal grandfather was terminated. Ob. 1625. = Elinor Barnwall.

Thomas Fleming, Lord Baron of Slane. a friar. Ob. s. p. William Fleming, Lord Baron of Slane, in his brother's lifetime, with his father's precedence. Summioned to and sat in parliament 1634, his brother living. Ob. 1641. = Lady Anne Macdonnell.

Charles Fleming, Lord Baron of Slane. Ob. s. p. Elinor Barnwall, first wife. = Randall, Lord Baron of Slane. Ob. 1677. = Lady Penelope Moore, daughter of Henry, Earl of Drogheda.

Richard Fleming, of Staholmock, Esq. = Mary Fleming, only child by first wife. Ob. 1741. = Colonel Oliver, O'Gara, second husband, no issue. Christopher, Lord Baron of Slane, attainted, but restored in blood 7 Ann. Ob. 1728. = Anne, daughter of Sir Patrick Trant, Bart. Henry Fleming died unmarried. Sir Gregory Byrne, Bart. Ob. 1713. = Alice Fleming, only daughter by second wife. Ob. 1753.

James Fleming, only child, died young. Hellen Fleming, only child, died unmarried, at Paris, Aug. 7. 1748. Buried at St Sulpice. Charles Byrne Esq. eldest son. Ob. 1752. = Margaret Colclough. Henry Byrne, of Oporto, in Portugal, second son. = Catherine, daughter of James Eustace, Esq.

Dudley Byrne. Ob.s.p. John Byrne. Ob.s.p. Cesar Byrne. Ob.s.p. James Byrne. Ob.s.p. Mary Byrne. Ob.s.p. Anne Byrne. Ob.s.p. Margt. Byrne. Ob.s.p. Frances Byrne. Ob.s.p. George = Catharine Xaveria, only child. Bryan. Esq.

Eustace Bryan. Ob. s. p. 1786. GEORGE BRYAN, of Jenkinstown, now, as sole heir, claims to be LORD BARON OF SLANE.

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CASES IN THE HOUSE OF LORDS

XVI. Thomas Fleming (sixteenth Baron, or lord of the manor, or barony, of Slane) had livery of his estates 20 Eliz. 1577. By a parliament pawn, it appears he was summoned to the parliament of the 27th Eliz. 1585; and by other documents it appears he sat therein; and thus a new barony was created in him. He married Catherine, daughter of Jenico, Viscount Gormans-town, by whom he had two daughters, his coheirs, Catherine, who became the wife of Pierce (or Peter) Butler, of the Old Abbey, in the county of Kilkenny, Esq., ancestor to the Lords Viscounts Galmoy; and Elinor, who became the wife of her cousin, William Fleming, heir male to her father. Lord Thomas died 9th Nov. 1597, when the peerage created by his summons and sitting in parliament, went into abeyance between his two daughters, Catherine and Elinor. But the manor, or palatine barony of Slane, went to the heir male, William Fleming, of Derpatrick, son of George, on whom it was settled by the deed of 1568.

The foregoing descent is proved by the recitals in the inquisition of the 40th Eliz. 1597, taken at Ratoath, before alluded to, which states "that James Fleming, of Stephenstown, died, and was succeeded by his son Thomas, who died without issue male, 9th Nov. 1597, and was succeeded by his cousin, William Fleming, of Derpatrick; that Thomas Lord Slane, left two daughters his coheirs, Elinor, wife of her cousin, William Fleming, and Catherine, wife of Pierce Butler, of Kilkenny.

Thus four creations by writ, successively, became in abeyance among coheirs.

XVII. William Fleming (the seventeenth Baron,

or lord of the manor, or barony, of Slane) of Derpatrick, succeeded his cousin in the manor or barony of Slane, of which he had livery, 3 Jas. I. 1605. He never was summoned to or sat in parliament, but was called Baron of Slane, and Lord of Slane, as are the heirs of the Husseys, Barons of Galtrim, and of the Nangles, Barons of Navan, to this day. He married Elinor, daughter and coheir of Thomas, Lord Fleming of Slane, by whom he had three sons, first, Christopher, his heir; second, George Fleming of Stephenstown, and third, James Fleming, of Staholmock and Derpatrick. He died 10 James I. 1612, and was succeeded by his eldest son, Christopher.

XVIII. Christopher Fleming, eldest son of William, the seventeenth, became the eighteenth Baron, or lord of the manor, or barony, of Slane; he had livery of his estate the 24th Nov. 10 James I., and was summoned to parliament the 11th and 15th years of King James the First; and it appears he sat in those parliaments. He thereby acquired a peerage descendible to his heirs general, or it should rather be considered as operating as a termination of the abeyance of the peerage created in his mother's father, Thomas, Lord Fleming Baron of Slane, which was then in abeyance between him and his aunt Catherine Butler, mother of Edward Butler, afterwards created Lord Viscount Galmoy. The crown determines an abeyance by patent, only in case of the favoured coheir being already a peer of higher dignity than the barony in abeyance, or in the case of a female, who cannot be summoned to parliament, and whose right is therefore recognised by patent.

By deed (recited in an inquisition taken at

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XVIII. Christopher Fleming, eldest son of William, the seventeenth, became the eighteenth Baron, or lord of the manor, or barony, of Slane; he had livery of his estate the 24th Nov. 10 James I., and was summoned to parliament the 11th and 15th years of King James the First; and it appears he sat in those parliaments. He thereby acquired a peerage descendible to his heirs general, or it should rather be considered as operating as a termination of the abeyance of the peerage created in his mother's father, Thomas, Lord Fleming Baron of Slane, which was then in abeyance between him and his aunt Catherine Butler, mother of Edward Butler, afterwards created Lord Viscount Galmoy. The crown determines an abeyance by patent, only in case of the favoured coheir being already a peer of higher dignity than the barony in abeyance, or in the case of a female, who cannot be summoned to parliament, and whose right is therefore recognised by patent.

By deed (recited in an inquisition taken at

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Ardee, 1 Char. I. 1625,) dated 29th June, 1624, this Lord Christopher settled his estates first on himself for life, then on his (second) son William, and his heirs male, remainder to his younger sons, John, Patrick, James, and Laurence, in tail male, remainder to his nephew George, of Stephenstown, son of George, remainder to his brother James Fleming of Derpatrick and Staholmock, remainder to Edward Fleming, of Siddon, in the county of Meath, with divers remainders over.

This Lord Christopher Fleming married Elinor, daughter of Sir Patrick Barnwall, of Turvey, Knt., by whom he had six sons ; first, Thomas, his heir — second, William — third, John — fourth, Patrick, — fifth, James — and sixth, Laurence. The four last died without issue. His lordship died 9th July, 1625.

Thomas Lord Baron of Slane, the eldest son, having embraced the profession of a friar, renounced all his rights to his next brother, William. He was excluded from the estates by his father's settlement of 1625, was a turbulent actor in the troubles of 1641, and the great rebellion which followed, and died without issue.

One of those strange anomalies occurred in the case of this title which exhibits the strongest evidence that the restraints of law influenced the sovereigns of these times very little in their acts. A dispensing power was exerted by the king, whereby he wished to transfer the rights of the peerage from the elder brother to the younger, and even made the transfer a contingency, depending on the will of a subject: thus William and his heirs male were to be Lords of Slane, during his brother's lifetime, under a king's letter, with a salvo jure,

that if the said Thomas renounced his profession of a friar, he should be at liberty to reclaim the honour of the peerage, whilst his brother should descend to the rank of a commoner; but this mandate of the king was not acquiesced in by the House of Lords.

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XIX. William Fleming, under his father's settlement, and by his brother's renunciation, became the nineteenth Baron, or lord of the manor, or barony, of Slane; as his brother Thomas never possessed the manor or palatine barony, although he was found by inquisition to be, as he unquestionably was, a baron of parliament, and was entitled to a writ as such.

This William Fleming, as before stated, having obtained a letter, under the signet and sign manual of King Charles the First, commanding that he and the heirs males of his body, should be Lords Baron of Slane, during the life of his elder brother Thomas, provided, however, that if the said Thomas abjured the profession of a friar, and claimed his right, this letter should not be prejudicial to him; the Lord Deputy took, thereon, the advice of the House of Lords, who recommended and resolved, that William, and his heirs, should be called to parliament by writ; and, accordingly, a writ issued to call William Fleming to parliament, with the same precedence his father had; which appears to have been following the practice which had obtained on former occasions: for when David Fleming was called to parliament, in the reign of King Edward the Fourth, it appears he obtained the precedence of the old peerage created in his ancestors, Baldwyn, or Simon, and took his place after Lord Gormanstown; and so it

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appears that on all the subsequent creations the new peers obtained the old precedency. From the frequent occurrence of creations, even by patent, giving precedence over old peers, it is evident the crown, in early times, conceived it possessed the power of giving such precedence; a right which, however, has long since ceased to be asserted or admitted as law. Under this writ, William Fleming, as Lord Baron of Slane, being introduced, took his seat in parliament the next day, the 14th July 1634, as a new peer, between Lords Howth and Dunsany. He married Lady Anne Macdonnell, daughter of Randall, Earl of Antrim, by whom he had four sons, first, Charles his heir—second, Randall, heir to his brother—third, Michael, who died unmarried, whose will is dated 24th April, 1669, and proved in Dublin, and—fourth, Thomas of Gillanstown, in the county of Meath, who left an only son William, who on the death of Christopher, Lord Slane, son of Randall, assumed the title of Lord Baron of Slane, as heir male, under, it is presumed, the import of King Charles's letter; but that letter, if it had been acted on, only said that William and his heirs male should be Lords Barons of Slane during the lifetime of Thomas his elder brother, who survived his brother William, Lord Slane. William, Lord Slane, was, after his death, outlawed for high treason, (18 Char. I. 1642,) but was afterwards declared innocent. He died in 1641, and was succeeded by his eldest son:

XX. Charles Fleming, the twentieth Baron, or lord of the manor or barony of Slane, became Lord Baron of Slane. He died in Italy in 1661, unmarried, and was succeeded by his brother.

XXI. Randall Fleming, the twenty-first Baron or lord of the manor, or barony, of Slane. An inquisition taken at Navan, 29 Char. II. 1677, finds that Randall, Lord Slane, had been restored to his estates, — and had then three sons, Christopher, seven years five months and seventeen days old, — Henry, six years nine months and six days old, — and Randall, three years ten months and three days old. Lord Randall married, first — Elinor, daughter of Sir Richard Barnwall of Crickstown, Bart, by whom he had an only daughter, Mary, aged, at her father's death, eleven years six months and twenty days, who was first married to Richard Fleming, son of Sir John Fleming of Staholmock, Knt., by whom she had an only son, James, who died young and unmarried. She married, secondly, Oliver O'Gara, Esq., by whom she had no issue. Said Randall, Lord Slane, married secondly, (5th Sept. 1673,) Lady Penelope Moore, daughter of Henry, first Earl of Drogheda, by whom he had three sons, as above — Christopher — Henry — and Randall, and a daughter — Alice: the two youngest sons died without issue. Lord Randall made his will 18th Feb. 1674, and dying 22d Oct. 1676, was succeeded by his eldest son.

XXII. Christopher Fleming, twenty-second Baron, or lord of the manor, or barony, of Slane, sat in King James the Second's pretended parliament in 1689, but being afterwards outlawed and attainted for high treason, was deprived of all his estates: he was, by an English Act of Parliament, restored in blood, but not to his estates. Queen Anne issued a Queen's letter, in the year 1712, to create him Viscount Longford, of the kingdom of Ireland: but no patent was issued.

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He had a pension of 500*l.* per annum, on the Irish establishment, 1707. The 19th Sept. 1684, he married Anne, daughter of Sir Patrick Trant, Bart., by whom he had an only daughter, Hellen. He died intestate, and administration of his effects was granted 13th June, 1728. On his death (the manor or barony of Slane having been forfeited and sold, the palatine barony became annihilated) the dignity of the peerage (created by the summons of Thomas, Lord Baron of Slane, in 1585, which became in abeyance on his death between his two daughters, Catherine and Elinor, and which abeyance was terminated in the summons and sitting of Christopher, Lord Slane, in 1613 and 1615) vested in Hellen, his only daughter, who died unmarried at Paris, in 1748, whereupon the peerage aforesaid went to her aunt, Alice, the only daughter of Randall, Lord Slane, by his second wife, who became Baroness of Slane in her own right, on the death of her neice Hellen, but did not assume the title: she married Sir Gregory Byrne, of Tymoge, in the Queen's County, Bart., by whom she had several children, viz. Charles, the eldest son, died in 1752, his mother being then alive, leaving four sons, Dudley, John, Cæsar, and James, who all in succession became Barons of Slane, but did not assume the title; and four daughters, Mary, Anne, Margaret, and Frances. Dudley died unmarried in 1756, John and Cæsar died unmarried in Germany, and James was drowned in the river Liffey, in 1777, unmarried. The daughters also all died unmarried. Henry Byrne, Esq., the second son of Sir Gregory Byrne, married Catherine, daughter and coheir of James Eustace, of Yeomanstown, in Kildare, Esq.,

and had an only daughter, Catherine-Xaveria, who on the death of James Byrne, in 1777, became Baroness of Slane. She married, in 1762, George Bryan, of London, Esq. second son of Pierce Bryan, of Jenkinstown, in the county of Kilkenny, Esq., by whom she had George Bryan, of Jenkinstown, Esq., her eldest surviving son and heir, and also heir of Alice, Lady Byrne, Baroness of Slane, and also of the said Randall, Lord Slane, William, Lord Slane, and of Christopher, Lord Slane; who either was created a peer by writ of summons and sitting in parliament in the years 1613 and 1615, or, the abeyance of the peerage, created by the summons and sitting of Thomas, Lord Slane, in 1585, between Catherine and Elinor, the two daughters of the said Thomas, was terminated, in his favour, by the said summons and sitting of said Lord Christopher, in 1613 and 1615. Catherine-Xaveria died 19th February, 1779, and was succeeded by her eldest son Eustace, who died unmarried in 1786, and was succeeded by his next brother, George Bryan, Esq., who claims to be Lord Baron of Slane, on three grounds; first, as heir of Christopher, son and heir of Elinor, eldest daughter and co-heir of Thomas, Lord Slane, summoned to parliament in 1585, the abeyance of which title was terminated by the summons and sitting of said Christopher in the parliament of 1613; or, secondly, as heir of the said Christopher, supposing such summons not a termination of the abeyance, who was summoned and sat in parliament in 1613 and 1615, and so became a new peer; or, thirdly, as heir to William, Lord Slane, second son of said Christopher, who was summoned to and sat in

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parliament in 1634, his eldest brother Thomas, a Roman Catholic priest, being then alive.

This case was signed by Mr. Crampton.

A supplemental and explanatory case was shortly afterwards printed and presented, stating as follows:—Although diligent search has been made, no patent is to be found on record, of the creation of any person to be Baron of Slane; but, by a Parliament Pawn now remaining in the Rolls' Office of the Chancery of Ireland, it appears that Thomas Fleming (Palatine Baron, or Lord of the manor, or barony, of Slane) was summoned to the Parliament of the 27th Elizabeth, 1585* ; and by other documents it appears he sat therein† ; and thus a barony in fee was created in him. He married Catherine, daughter of Jenico, Viscount Gormanstown, by whom he had two daughters, his co-heirs,—Elinor, who became the wife of her cousin, William Fleming, heir male to her father ; and Catherine, who became the wife of Pierce (or Peter) Butler, of the Old Abbey, in the county of Kilkenny, Esq., ancestor to the Lords Viscounts Galmoy. Lord Thomas died 9th November, 1597, when the peerage created by his summons and sitting in Parliament, went into abeyance between his two daughters, Elinor and Catherine. But the manor, or palatine barony of Slane, went to the heir male, William Fleming, of Derpatrick, son of George, son of William, son of Thomas, brother of Sir George Fleming, father of James, father of Thomas

* Parliament Pawn, 1585.

† Book in the Office of Ulster King of Arms, called " Cases of Precedence "

Lord Slane, on whom it was settled by a deed made in 1568.*

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William Fleming, of Derpatrick, succeeded his cousin in the manor or barony of Slane, of which he had livery, 3 James I. 1605. He never was summoned to or sat in Parliament, but was called Baron of Slane, and Lord of Slane, as are the heirs of the Husseys, Barons of Galtrim, and of the Nangles, Barons of Navan, to this day. He married Elinor, daughter and co-heir of Thomas, Lord Fleming of Slane, by whom he had three sons, first, Christopher, his heir, second, George Fleming, of Stephenstown, and third, James Fleming, of Staholmock and Derpatrick. He died 10th James I. 1612, and was succeeded by his eldest son, Christopher.†

Christopher Fleming, eldest son of William Fleming, became the eighteenth Baron, or Lord of the manor, or barony, of Slane; he had livery of his estate the 24th November, 10th James I., and was summoned to Parliament the 11th and 15th years of King James the First, and it appears he sat in those parliaments.‡ He thereby acquired a

* The foregoing descent is proved by the recitals in an inquisition of the 40th Elizabeth, 1597, taken at Ratoath, which states — “ that James Fleming, of Stephenstown, died, and was “ succeeded by his son Thomas, who died without issue male, “ 9th Nov. 1597, and was succeeded by his cousin, William “ Fleming, of Derpatrick; that Thomas Lord Slane left two “ daughters his co-heirs, Elinor, wife of her cousin, William “ Fleming, and Catherine, wife of Pierce Butler, of Kilkenny.”

† Book of Funeral Entries of the Nobility and Gentry of Ireland, from 1604 to 1622, in the office of Ulster King of Arms.

‡ Cases of Precedence; also the return to a commission, dated 27th August, 11 Jac. I., to inquire into certain disorders in Ireland; and, among others, why certain Peers left their house, and ceased their attendance; from the Rolls Office of

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peerage descendible to his heirs general, or it should rather be considered as operating as a termination of the abeyance of the peerage created in his mother's father, Thomas Lord Fleming, Baron of Slane, which was then in abeyance between his mother and Catherine Butler, mother of Edward Butler, afterwards created Lord Viscount Galmoy. The Crown determines an abeyance by patent, only in case of the favoured coheir being already a peer of higher dignity than the barony in abeyance, or in the case of a female, who cannot be summoned to parliament, and whose right is therefore recognised by patent.

By deed (recited in an inquisition taken at Ardee, 1 Charles I. 1625) dated 29th June, 1624, this Lord Christopher settled his estates first on himself for life, then on his (second) son William, and his heirs male, remainder to his younger sons, John, Patrick, James, and Laurence, in tail male, remainder to his nephew George, of Stephenstown, son of George, remainder to his brother James Fleming, of Derpatrick and Staholmock, remainder to Edward Fleming, of Siddon, in the county of Meath, with divers remainders over.

This Lord Christopher Fleming married Elinor, daughter of Sir Patrick Barnwell, of Turvey, Knt. by whom he had six sons; first, Thomas, his heir—second, William—third, John—fourth, Patrick—fifth, James—and sixth, Laurence. The four last died without issue. His Lordship died 9th July, 1625.

Thomas, Lord Baron of Slane, the eldest son,

the Chancery of Ireland, by which it appears that Lord Slane sat in that Parliament.

having embraced the profession of a friar, renounced all his rights to his next brother, William. He was excluded from the estates by his father's settlement of 1625, was a turbulent actor in the troubles of 1641, and the great rebellion which followed, and died without issue.

One of those strange anomalies occurred in the case of this title, which exhibits the strongest evidence that the restraints of law influenced the sovereigns of those times very little in their acts. A dispensing power was here exerted, whereby the king wished to transfer the rights of the peerage from the elder brother to the younger, and even made the transfer a contingency, depending on the will of a subject: William, and his heirs male, were directed to be Lords of Slane, during his brother's life-time, under a king's letter, with a *salvo jure*, that if the said Thomas renounced his profession of a friar, he should be at liberty to reclaim the honour of the peerage, whilst his brother should descend to the rank of a commoner; but this mandate of the King was not acquiesced in by the House of Lords.

William Fleming, under his father's settlement, and by his brother's renunciation, became nineteenth Baron, or Lord of the manor, or barony, of Slane; as his brother Thomas never possessed the manor or palatine barony, although he was found by inquisition to be, as he unquestionably was, a Baron of Parliament, and was entitled to a writ as such.

This William Fleming, as before stated, having obtained a letter, under the signet and sign manual of King Charles the First, commanding that he and the heirs male of his body, should be Lords Barons of Slane, during the life of his elder brother

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Thomas, provided, however, that if the said Thomas abjured the profession of a friar, and claimed his right, this letter should not be prejudicial to him ; the Lord Deputy took thereon the advice of the House of Lords, who recommended and resolved, that William and his heirs should be called to Parliament by writ ; and accordingly a writ issued to call William Fleming to Parliament, with the same precedence his father had, which appears to have been following the practice which had obtained on former occasions ; for when David Fleming was called to Parliament, in the reign of King Edward the Fourth, it appears he obtained the precedence of the old peerage created in his ancestors, Baldwyn, or Simon, and took his place after Lord Gormans-town, and so it appears that on all the subsequent creations the new peers obtained the old precedence. From the frequent occurrence of creations, even by patent, giving precedence over old peers, it is evident the Crown, in early times, conceived it possessed the power of giving such precedence ; a right which, however, has long since ceased to be asserted or admitted as law. Under this writ, William Fleming, as Lord Baron of Slane, being introduced, took his seat in Parliament the next day, the 14th July, 1634, as a new peer, between Lords Howth and Dunsany. He married Lady Ann Macdonnell, daughter of Randall, Earl of Antrim, by whom he had four sons ; first, Charles, his heir—second, Randall, heir to his brother—third, Michael, who died unmarried, whose will is dated 24th April, 1669, and proved in Dublin, and—fourth, Thomas of Gillanstown, in the county of Meath, who left an only son, William, who, on the death of Christopher

Lord Slane, son of Randall, assumed the title of Lord Baron of Slane, as heir male, under, it is presumed, the import of King Charles's letter, but that letter, if it had been acted on, only said that William and his heirs male should be Lords Barons of Slane during the lifetime of Thomas, his elder brother, who survived his brother William, Lord Slane. William, Lord Slane, was, after his death, outlawed for high treason, (18 Charles I. 1642.) but was afterwards declared innocent. He died in 1641, and was succeeded by his eldest son :

Charles Fleming, the twentieth Baron or Lord of the manor or barony of Slane, became Lord Baron of Slane. He died in Italy, in 1661, unmarried, and was succeeded by his brother :

Randall Fleming, the twenty-first Baron or Lord of the manor, or barony of Slane. An Inquisition taken at Navan, 29th Charles II. 1676, finds, that Randall, Lord Slane, had been restored to his estates, — and had then three sons, Christopher, seven years five months and seventeen days old, — Henry, six years nine months and six days old, — and Randall, three years ten months and three days old. Lord Randall, married first, Elinor, daughter of Sir Richard Barnwall, of Crickstown, Bart., by whom he had an only daughter, Mary, aged at her father's death, eleven years six months and twenty days, who was first married to Richard Fleming, son of Sir John Fleming of Staholmock, Knt., by whom she had an only son, James, who died young and unmarried. She married, secondly, Oliver O'Gara, Esq., by whom she had no issue. Said Randall, Lord Slane, married secondly, (5th September, 1678,) Lady Penelope Moore, daughter of Henry first Earl of Drogheda, by whom he had

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three sons as above — Christopher — Henry — and Randall, and a daughter — Alice: the two youngest sons died without issue. Lord Randall made his will 18th Feb. 1674, and dying 22d Oct. 1676, was succeeded by his eldest son.

Christopher Fleming, twenty-second Baron, or Lord of the manor, or barony, of Slane, sat in King James the Second's pretended Parliament in 1689, but being afterwards outlawed and attainted for high treason, was deprived of all his estates; he was, by an English Act of Parliament, restored in blood, but not to his estates. Queen Anne issued a Queen's letter, in the year 1712, to create him Viscount Longford, of the kingdom of Ireland; but no patent was issued. He had a pension of 500*l.* per annum, on the Irish establishment, 1707. The 19th September, 1684, he married Anne, daughter of Sir Patrick Trant, Bart., by whom he had an only daughter, Hellen. He died intestate; and administration of his effects was granted 13th June, 1728. On his death (the manor or barony of Slane having been forfeited and sold, the Palatine Barony became annihilated) the dignity of the Peerage (created by the summons of Thomas Lord Baron of Slane, in 1585, which became in abeyance on his death, between his two daughters, Elinor and Catherine, and which abeyance was terminated in the summons and sitting of Christopher Lord Slane, in 1613 and 1615,) vested in Helen, his only daughter, who died unmarried at Paris, in 1748, whereupon the peerage aforesaid went to her aunt, Alice, the only daughter of Randall, Lord Slane, by his second wife, who became Baroness of Slane in her own right, on the death of her niece Helen, but did not assume the title; she married Sir

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Gregory Byrne, of Tymoge, in the Queen's County, Bart., by whom she had several children, viz. Charles, the eldest son, died in 1752, his mother being then alive, leaving four sons, Dudley, John, Cæsar, and James, who all in succession became Barons of Slane, but did not assume the title; and four daughters, Mary, Anne, Margaret, and Frances. Dudley died unmarried in 1756, John and Cæsar died unmarried in Germany, and James was drowned in the River Liffey, in 1777, unmarried. The daughters also all died unmarried.* Henry Byrne, Esq., the second son of Sir Gregory Byrne, married Catherine, daughter and co-heir of James Eustace, of Yeomanstown, in Kildare, Esq., and had an only daughter, Catherine-Xaveria, who, on the death of James Byrne, in 1777, became Baroness of Slane.† She married, in 1762, George Bryan, of London, Esq., second son of Pierce Bryan, of Jenkinstown, in the County of Kilkenny, Esq.‡, by whom she had George Bryan, now of Jenkinstown, Esq., her eldest surviving son and heir, and also heir of Alice Lady Byrne, Baroness of Slane, and also of the said Randall, Lord Slane, William, Lord Slane, and of Christopher, Lord Slane, who either was created a peer by writ of summons and sitting in Parliament, in the years 1613 and 1615; or the abeyance of the peerage created by the summons and sitting of Thomas, Lord Slane, in 1585, between Elinor and Catherine, the two daughters.

* Bill filed in Chancery of Ireland and Answer thereto, 4th Jan. 1774. Paper Case referring to the above suit, found in the possession of James Butler, Esq.

† Pedigree found among the family papers of claimant, in the hand-writing of his father.

‡ Parish Register of St. Clement's Danes.

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ters of said Thomas, was terminated in his favour by the said summons and sitting of said Lord Christopher in 1613 and 1615. Catherine-Xaveria died 19th Feb. 1779*, and was succeeded by her eldest son Eustace, who died unmarried in 1786, and was succeeded by his next brother, George Bryan, Esq., who claims to be Lord Baron of Slane, on three grounds; first, as heir of Christopher, son and heir of Elinor, eldest daughter and co-heir of Thomas, Lord Slane, summoned to Parliament in 1585, the abeyance of which title was terminated by the summons and sitting of said Christopher in the Parliament of 1613; or, secondly, as heir of the said Christopher, supposing such summons not a termination of the abeyance, who was summoned and sat in Parliament in 1613 and 1615, and so became a new peer; or, thirdly, as heir to William, Lord Slane, second son of said Christopher, who was summoned to and sat in Parliament in 1634, his eldest brother Thomas, a Roman Catholic priest, being then alive.

This case was also signed by Mr. Crampton.

In 1831, Mr. Fleming proceeded on his petition, and printed and presented to the House the following case and argument, claiming the Barony of Slane, as heir male.

The case, which Mr. George Bryan has submitted to the house of peers, is founded upon the allegation, that the barony of Slane, which has hitherto been considered as ONE ancient Irish barony, is, in reality, composed of six distinct peerages in fee — That these peerages, although alleged to have been created at six different

* Entries in the family missal.

periods, from 1309 to 1634, in the family of Fleming, are all now co-existing in the respective heirs general of the six individuals so ennobled, and are all entitled to precisely the same place, and precedence: of which peerages Mr. Bryan claims to be entitled in his own person, to a share of the fourth, and the whole of the fifth and sixth.

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These creations are stated by the case to have taken place as follows: —

1st, The peerage of Lord le Fleming, 1309, 3rd Edw. II. 2nd, Lord Fleming, 1462, 2nd Edw. IV. 3rd, Baron of Slane, Edw. IV. 4th, Lord Baron of Slane, 1585, 27th Eliz. 5th, Lord Baron of Slane, 1613, 11th Jas. I. 6th, Lord Baron of Slane, 1634, 10th Chas. I.

In opposition to this statement, the following allegations are humbly submitted: —

1st. — That in all and each of these instances of supposed creation of peerage, the individuals so alleged to have been ennobled, were previously peers of the realm, and Lords of Parliament by inheritance.

2d. — That if these individuals had not been peers by inheritance, the immediate agency of an adequate legal and constitutional power so to enoble them, has in no one instance been proved to have intervened in these alleged creations of peerage.

3d. — That even supposing the power of ennobling commoners without the specific sanction of the royal authority, and of creating peerages by writ of summons to the parliaments of Ireland, to have legally, and constitutionally vested in the option and pleasure of the successive Lords Lieutenant, and Lords Justices of Ireland, and even of

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their deputies, who were often themselves commoners, the proofs usually deemed necessary in England, where peerages by writ actually exist, to substantiate such creations by royal writ of summons to, and sitting in parliament in virtue thereof, have not been produced by Mr. Bryan, in any one instance of these six alleged creations.

4th. — That as in every one of these supposed creations in fee, each alleged new peer is shewn by Mr. Bryan himself, in his case, to have been the male heir, not only of each preceding Lord, but also of Archenbald le Fleming, the founder of the family of Fleming in Ireland, in the reign of Henry II. ; and as each took his seat accordingly, without question or dispute, amongst the most ancient barons of Ireland, the only legal and constitutional inference is, that they all succeeded in such character of male heir, as of right, to the rank and precedence of their ancestors.

5th. — That on the successive claims by all these male heirs to the rank and place in parliament, held by their predecessors, in no one instance did the female heirs of such respective predecessors, make any objection to such claim, or prefer any claim, on their part to the peerage.

6th. — That the calling into actual co-existence so many baronies in fee, of the creation and existence of which, neither the crown, the legislature of Ireland, nor the parties concerned, appear hitherto to have entertained the least suspicion, and to all of which have been awarded precisely the same rank and precedence in parliament, would occasion considerable difficulty as to the future allocation of the peers of Ireland, not only with regard to the five or six peerages thus made

to branch out from the barony of Slane, but which would extend to the numerous peerages into which all the other ancient baronies of Ireland would be found to be similarly sub-divided.

First alleged peerage.

The only ground which the case of Mr. Bryan advances to prove that the dignity of Baron of Slane was not a Peerage of Parliament, but a palatine honor, is that the manor of Slane was, in the reign of King Edward the Third, held of the heirs of de Lacy Lord of Meath, by feudal service, although it is fully admitted, that Baldwyn and Simon le Fleming, Barons of Slane, who are proved so to have held it, were Peers of Parliament.

This doctrine, which would, contrary to all law and precedent, prove that the crown could not confer the dignity of the Peerage in Ireland upon whom it pleased, is contradicted by Mr. Bryan's own case; for if King Edward the Second could ennoble Baldwyn le Fleming, it must be admitted that the former kings had the same power of elevating Baldwyn's ancestors to the rank of peers.

No evidence is produced in Mr. Bryan's case, to shew that de Lacy ever granted the manor of Slane to Fleming. It appears from Maurice Regan, a contemporary historian, that Crenoda was conferred by de Lacy upon Richard Fleming, to hold by twenty knights' fees; but Richard was not the ancestor of the barons of Slane, and Slane was never held by knights' fees, but by the payment of one penny a year for all manner of service.

Archenbald le Fleming, of Bratton, in Devonshire, was one of the leaders under Henry II., in

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the invasion of Ireland. Besides his manors of Slane and Newcastle, on the river Boyne, he and his son were possessed of the extensive manors of Astmaynbeg, Astmayveynmore, and Newcastle de Iskertenen, in Tipperary, which were held of the crown in capite. (Plea Rolls, 28th Edward I., 1st, 2nd, and 5th Edward II.) Archenbald was the first witness to the charter of Philip Telynge to his burgesses of Syddan, which is exemplified in the statute 15th and 16th Edward IV., cap. 51, and the light in which he so added his confirmatory signature to the instrument, is sufficiently explained by the act, which directs the portreve of Syddan, to render his accounts annually to the bishop of Meath, the abbot of St. Thomas the Martyr, (rector of Syddan,) and "le Baron de Slane, Chief "Seigneur del Baronie," all for the time being.

The plea Rolls, 1st and 2nd Edward II., prove that he was the father of Stephen le Fleming, who, in 1185, with nine principal attendants, and fifty horses, accompanied Prince John, then appointed Lord of Ireland, to take possession of his government. The sheriff of Devonshire charges 66s. 8d. in his accounts for his expenses. (Pipe Roll, L. 31 Henry II.) In 1199, he gave the king one hundred shillings for a writ of mort d'ancestor, for thirty carrucates of land, which he sought against Adam Rudypac, and for ten carrucates against Reginald le Poer. (Oblata Roll, T. L. 1 John.) The suit against the former related to lands in Meath, as from the Plea Roll, 6th Edward I., it appears that the estates of Rudypac were on the Boyne. That against Poer was for lands in Tipperary. In both cases the king was the lord to whom the fine was paid.

Stephen attended king Henry III. in his first expedition into Gascony, and during his absence, Philip de Wigornia seised his possessions in Tipperary. (Plea Roll, 1 Edward II.) In the two following reigns, the heirs of Stephen took proceedings at law for their recovery. Baldwyn, his great grandson, in consideration of a sum of money, relinquished to Philip de Prendergast by his charter, commencing with these words, "Baldwynus le Fleming, filius Ricardi, Dominus de "Slane," his rights to Newcastle de Eskertenen. (Memorandum Roll, 4 Edward II.) The other estates were recovered; but owing to the English power becoming circumscribed to the districts within the pale, they were lost to his descendants.

Stephen was succeeded by his son Baldwyn. (Plea Roll, 1 Edward II.) In 28th Henry III., the king summoned twenty-one Irish kings and princes, and ten of his principal Anglo-Irish magnates, or peers, amongst whom is Baldwyn Fleming, to attend him in his wars against the King of Scotland. Having made peace, he wrote letters of thanks to each of them, and requested to have their services in the ensuing summer; after which, they should return to Ireland with manifold honors and suitable rewards. This writ establishes that in the reign of Henry III., the head of the family of Fleming was considered a magnate of Ireland, and classed with the other great barons of that kingdom. (Close Roll, T. L. 28 Henry III., m. 7. d.) Baldwyn was succeeded by his son Richard. (Plea Roll, 1st Edward II.)

From the succession of Richard to the peerage, the descent of the dignity of Baron of Slane, can be clearly traced by the public records of Ireland,

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which, with some exceptions, are extant from the reign of Edward I.

It is objected, in Mr. Bryan's case, that although Richard is officially styled Baron of Slane, yet that he was not a Peer of Parliament. The only ground for this objection is, that in the list of a Parliament, stated by Sir Richard Cox to have been held in Ireland in 1295, his name does not appear. The original roll, from which the list was taken, is extant in the Tower of London. (Close Roll, 2 Edward I.) The writ is not a summons to parliament, but a letter of credence for John Wogan, the justice, directed to several magnates of Ireland.

Richard Lord Slane was from the 22nd Edward I., to the 29th of the same reign, in which year he died, constantly engaged as a tenant of the crown for his manors in Devon, in the wars which the King waged against Scotland and Wales. (Close Rolls 25th and 29th Edward I. Welsh Roll 22nd same reign.) The King most certainly would not have given the Lord Justice of Ireland a letter of credence to a nobleman employed in his service in another country. It may also be remarked, that Richard Lord Slane is not the only great Baron of Ireland whose name does not appear in the list. Lord Courcy, of Kinsale, is not named in it, although his heir male and successor, was, after a long and solemn investigation, adjudged precedence above the Lord of Kerry, the name of whose ancestor, Maurice Fitz-Thomas, appears in the writ.

But if Lord Slane were not absent from Ireland, and if the names of other great Barons were not omitted, it is submitted that the omission of his name in such a writ, could be no evidence against

his Peerage; the document neither purports to be addressed to, nor to name, all the magnates of Ireland; it, and writs of a similar nature, were addressed only to those, whose services the Crown at the time required. Even in the Parliamentary writs of summons of the reigns of Edward III. and Richard II., when the Peerage is admitted to have been in existence, the name of the then Baron of Slane does not once occur.

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The construction which Mr. Bryan's case would put upon the style of "Baron of Slane" in the Fleming family, is not only unsupported by evidence, but absolutely contradicted by the documents therein cited. In two entries on the Pipe and Memorandum Rolls of 6th. Edward I., Richard is styled "Ricardus le Fleming Baro de Slane." In a charter enrolled on the Memorandum Roll of the fourth year of the following reign, (which is cited, but mistranslated, in Mr. Bryan's case, page 7.) his son and successor, styled himself "Baldewynus le Fleming, filius Ricardi, Dominus de Slane;" in another deed dated two years subsequently, he calls himself "Baldewynus le Fleming, Baro de Slane," (Mem. R. 6 Edw. II.) In the Pipe Roll of the following year, he is styled "Baldewynus le Fleming Dominus de Slane." It is proved by the statute, 2 Edward IV. cap. 15. that Baldwyn's son, grandson, and great-grandson, sat as peers of parliament solely by the title, style, and dignity of Baron of Slane. The act 38 Henry VI. cap. 30. states that the ancestors of Lord Gormanston, at whose prayer both these statutes were passed, had from the time of "Richard jaditz Roy d'Engleterre" precedence in parliament of each Baron of Slane, and the statute 2 Edward IV.

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(cap. 15,) enacts that Lord Gormanston should have precedence above every Baron of Slane that ever should be. Finally there is not a single record in existence, in which any other title of honor, save that of Slane, is applied to the head of the family.

Richard Lord Slane, having been killed in the Scotch wars, in 29 Edward I., was succeeded by his son Baldwyn, the fifth Baron of Slane and Peer of Ireland, in succession. It is in the person of this nobleman, and on the pretence of a writ of summons, directed to him in the third year of Edward II., that Mr. Bryan would found his first peerage in fee. This writ is the earliest summons to the parliament of Ireland extant on the rolls; and even had it been the law or custom of Ireland, to create peers by writ, which for reasons to be hereafter stated, it is submitted it never was, this summons could not have had a creative effect, as no evidence can be adduced to prove that the individual summoned, was not previously a peer of the realm.

The Roll itself contains evidence which clearly disproves the conclusions attempted to be drawn from the writ, by Mr. Bryan's case. After reciting a copy of the summons directed to the Earl of Ulster;—in allusion to the persons summoned, it states;—that similar writs were directed to divers prelates and other peers and men in Ireland. In continuation, it says, that at the appointed day, all those who were summoned appeared before the Justice and others of the King's council; when a petition on the part of the King was read, praying the prelates, earls, and barons, and other good men of the community of the land, who came by

summons ("prelates, countes, e barons e autres bones genz de la communiaute de la tre q s [] venuz p somance)" to watch over the welfare of Ireland, &c. This decisively proves that besides the earls and barons, various other persons were summoned to, and sat in, this parliament; and that these individuals were not peers, even whilst they sat in parliament, in virtue of their writs of summons. It consequently follows that this writ of summons could not have created a peerage.

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It is therefore confidently submitted, that Baldwin and his successors, whose peerage, in consequence of the existence of official records, cannot be denied, must have derived their dignity by some other means than the summons of Edward II., and that, as he inherited the dignity of Baron of Slane from his ancestors, and transmitted it to his posterity, he must be ranked amongst those Barons who in their capacity of peers of the realm, with the earls, and good gentlemen who were summoned, gave their advice to the King.

It is rather curious, that Mr. Bryan's case (page 10.) should, in opposition to the before-mentioned document, state "that no evidence had been discovered to shew that Baldwin attended this parliament, and it is probable that he did not."

Baldwyn, unlike his father, resided principally in Ireland, and in consequence, there were six writs of credence and military summons, directed to him, with the other magnates of Ireland, during the reign of Edward II.

It is rather a proof of conscious weakness that Mr. Bryan should base his claim upon an historical suppression of the utmost importance to his case.

In consequence of the notoriety of the fact of

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the continued male descent of all the existing ancient baronies of Ireland, from the reign of King Henry VII. to the present time, it became necessary to shew that a class of peerages in fee, was anciently introduced into Ireland, and Edmond Spenser was fixed upon as the highest and only authority for this historical event. "We are indebted," says the case, (page 8.) "to that acute writer, for the only light we possess as to the cause of this extraordinary increase in the number of the barons of Ireland, and the introduction of peerages by writ." It then quotes, amongst others, the following words from Spenser, in support of this position:—"King Edward III. was advised to direct out his writs to certaine gentlemen of the best ability and trust, entitling them barons, in the next parliament; by which means, he had so many barons in his parliament, as were able to weigh down the clergy and their friends;" but it suppresses the conclusion of Spenser's sentence, from which it appears that the dignities accruing from these writs, were not peerages in fee, or, indeed, peerages at all; "the which barons, they say, were not afterwards Lords, but only Baronets, as sundry of them doe yet retayne the name." Thus Spenser, their own and sole authority, contradicts the only fact which he is produced to prove.

In conclusion, it may be stated, that even upon the principles laid down in Mr. Bryan's case, it can be clearly proved that the title of Baron of Slane was not a palatine honor. It is admitted throughout his case, that a palatine honor can only exist by the seisin of the lands from which its name is taken, and that it became annihilated

by the loss of those lands. If therefore, it can be proved that a descendant of the family, although in possession of the manor, was not Baron of Slane; and that another descendant of the family was Baron of Slane, although not in the possession of the manor; it follows upon Mr. Bryan's own shewing that the title of Baron of Slane could not have been a palatine honor. By the inquisition taken at Athirdee in 1625, (given in evidence to the House, by Mr. Bryan,) it was found that Christopher Lord Slane was succeeded by his eldest son Thomas Fleming, then Lord Baron of Slane; that Christopher had, by a deed of settlement, (recited in the inquisition) disinherited his said eldest son, and settled all his estates, including the manor of Slane, upon William Fleming, his second son, upon whom they devolved accordingly. William, although in possession of the manor of Slane, never was recognised by, nor assumed any title of honor, until 1629, when, in consequence of his elder brother having become a friar, the King granted him the anticipatory enjoyment of the "honor and title of Baron of Slane." Thus, the seisin of the manor of Slane did not give to its possessor the title of Baron of Slane. The Act 37 Henry VI., cap. 7. recognises the then heir male of the family who had succeeded to the exclusion of female heirs, as "Davy (David) Flemyng, Baron de Slane," although it proves that the King was then not only seised of, but that he claimed the manor of Slane; it is also proved by another statute, (2 Edward IV. cap. 15.) that David, although a peer of parliament absented himself from the parliaments and great councils. Thus, the heir male of the family, although he had not seisin of

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of the manor of Slane, and although he could not have been created a peer by writ of summons, as he had "absented himself from the parliaments and great councils," was recognised as Baron of Slane, and in that capacity, as a peer of parliament. It may also be remarked, that the Act of 7 Anne, cap. 53. which confirmed the forfeiture of the manor of Slane, as well as of the other estates of Christopher, the then Baron of Slane, restored him "to his blood and title of honor only."

It is perhaps unnecessary to notice the long statements of the descent of the Genevylle family in Mr. Bryan's case, as it is not alleged that any peerage was derived through them. It may, however, be stated that the marriage between Baldwin, Baron of Slane, and Matilda de Genevylle did not take place until the 4th of Edward II., (Harleian MSS., No. 1425.) the year after the pretended creation of the peerage by writ of summons; and that according to their own pedigree she was not a co-heir of the family of Genevylle.

The title descended from Baldwyn, to his son Symon, from Symon to his son Thomas, and from Thomas to his son Christopher, all of whom, it appears by the statute 2 Edward IV., sat in parliament as Barons of Slane. The case of Mr. Bryan, in opposition to this act, and every other authority, designates these noblemen by a title never before heard of, either in the annals, the records, or the parliaments of Ireland — that of Lord le Fleming.

Christopher, Baron of Slane, died 26 Henry VI. He had two sons, John and David. John died in his father's lifetime, leaving issue, Christopher, successor to his grandfather, and two daughters,

Anne and Amia. (Inquisitions, T. L. 26 Hen. VI. and 11 Edward IV.) Christopher, the grandson, sat in parliament, 29 Henry VI., and died without issue the 36th year of the same reign. It appears from the act 37 Henry VI., cap. 16., (statute roll of that year) that it was found by two inquisitions, (the one taken before the barons of the Exchequer in Dublin, and the other in the county of Louth,) that Christopher, late Baron of Slane, died without issue, and that Anne and Amia were his sisters and heirs. In that capacity, the statute confirmed to them and their husbands a certain head-rent, payable out of the town of Dundalk, of which their brother was in his lifetime seised.

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Second alleged peerage: — Christopher, Baron of Slane, was succeeded in his peerage, to the exclusion of his sisters, by his uncle and heir male David Baron of Slane, who is recognised by that title in a statute entered on the very same roll, with that in favour of his nieces. (Cap. 7.) The act expressly states, that the crown under an alleged right, not only claimed, but actually then had possession of the manor of Slane. This statute, and that in favour of the heirs general before mentioned, would of themselves, it is submitted, establish that the barony of Slane, was neither a peerage in fee nor a palatine honor. Had it been the former, it would have become abeyant between the heirs general: had it been the latter, it would have been annihilated by the non-possession of the lands.

Yet it is upon this hereditary succession of David, Baron of Slane, and in contradiction to these statutes and various other records, that Mr. Bryan's case, creates its second title, its first abey-

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ance, and its first new peerage. The manner in which these three points are effected must be noticed.

The case states, (page 8.,) that "Sir David Fleming, eleventh palatine baron, or lord of the manor, or barony of Slane, was summoned to parliament and sat therein, 2 Edward IV., by the title of Lord David Fleming, Baron of Slane; he is so described in the act of parliament passed to decide the precedence between him and Lord Gormanston. It appears that he was allowed, probably by the royal favour of his cousin, King Edward IV., the precedence of the original barony, then in abeyance between his nieces. An act was passed that he should be placed after Lord Gormanston, whose grandfather, Sir Christopher Preston, sat above Lord Thomas Fleming, Baron of Slane, and his grandfather sat above Lord Simon Fleming, Baron of Slane."

A reference to the act itself will shew, that Lord David, so far from being created a new peer in fee by sitting in this parliament, absolutely "absented himself from the parliaments and great councils," — and that he was nevertheless recognised as now (ore) Baron of Slane, and a peer of parliament by descent; and that so far from having had a new title conferred upon him, he bore precisely the same title, dignity, and rank as his predecessors, Thomas Fleming, Baron of Slane, and Simon Fleming, Baron of Slane, who are the same individual peers whom Mr. Bryan's case, in the process of subdividing the peerage and varying the titles, judged it expedient in the history of its first barony, to designate as "Sir Thomas Fleming,

“ Knight, third Lord le Fleming,” and “ Sir Simon Fleming, Knight, Lord le Fleming.”

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From the statute of the 38 Henry VI. we find that the Prestons, Lords of Gormanston, claimed a continued precedence of the Barons of Slane, from the time of King Richard I., or beyond the memory of man, in the exercise of their functions of lords of parliament; and that the parliament sanctioned the right which Lord Gormanston claimed upon that ground. The “ Richard jaditz, Roi d’Engleterre,” named in the act, can, as the words themselves imply, refer only to Richard I., as Simon Lord Slane, whose place in parliament is cited in the statute 2 Edward IV., as one of the proofs of this prescriptive precedence, died seven years before the accession of Richard II.

The award to Lord David, by the parliament, of the place next in rank to Lord Gormanston, was clearly in reference to a claim of right advanced by him, as derived from his predecessors, and not owing, as the case most gratuitously asserts, to the favour of Edward IV. For, on comparing the two acts upon the subject, 38 Henry VI. and 2 Edward IV. it evidently appears, that David, Lord Slane, claimed, as his right, the same place that had been assigned to his immediate predecessor, Lord Christopher, namely, that above Lord Gormanston; but that upon Lord Gormanston proving, to the satisfaction of the parliament, that such place had been unjustly awarded to Lord Slane by the undue partiality of the Earl of Ormond, the then lord justice, for that his ancestors had, from time immemorial, been allowed precedence of the successive barons of Slane; and upon his proving that precedence to have been so en-

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joyed for above a century back, the parliament awarded to Lord David, as his right, only the precedence that had been enjoyed by his more remote predecessors, namely, the place next below Lord Gormanston. But it appears from the sequel that this newly created peer of the case, far from imagining that he owed either his peerage or his precedence to "favour," was so unreasonable as not to be satisfied with the place adjudged to him, high as it was, amongst the ancient peers of Ireland.

Third alleged peerage: — David, Baron of Slane, died leaving a son, Thomas, his successor, and three daughters — Anne, Margaret, and Elizabeth. Thomas died during his minority, and was succeeded in the peerage by his cousin James, grandson and next surviving heir male of Thomas Fleming, Baron of Slane, mentioned in the act, 2 Edward IV. Thomas, Baron of Slane, the son of David, died 8th December, 11 Edward IV., and an act was passed immediately after his death, 11–12 Edward IV. (cap. 62.), stating that James, Baron of Slane, had some time before gone to England, on business specially concerning his inheritance in that kingdom, and granting him permission to remain there for one year: a subsequent statute, 12–13 Edward IV., cap. 5., before the expiration of the year, and consequently before he could have sat in parliament, declares him to be "*un seigneur et baron del parlement.*" In two acts entered on the last-mentioned roll, cap. 18. and 19., James, Baron of Slane, is declared to be "*cousin and heire masle*" of Thomas, late Baron of Slane.

Mr. Bryan's case, in opposition to these enactments, all of which it cites, creates, upon the suc-

cession of James to his hereditary dignity, a second abeyance, a third title, and a third peerage: and it asserts that James, who, as heir male of the family, inherited, and transmitted to his successors the ancient parliamentary dignity of Slane, was created a peer by writ of summons to, and sitting in, parliament in the reign of Edward IV., although it does not offer any proof to the House as to what parliament he was summoned to, or in what parliament he sat during that reign.

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James, Baron of Slane, was succeeded by his son Christopher, Baron of Slane, who died in 1518, leaving an only son James, his successor, and two daughters, Ellinor and Catherine. (Inquisition, 9 Henry VIII.) James, by the style of "Dominus "Baro de Slane," is ranked next after Lord Birmingham of Athenry, the premier Baron of Ireland, in the list of the peers who were present in the parliament of 1541, which made Henry VIII. King of Ireland. (State Paper Office, London). By a deed, dated 32 Henry VIII., James settled certain lands, in default of issue male to himself, upon his sister Catherine. He died without issue, when she succeeded to the estate so limited, which she transmitted to her posterity. (Bill and answer in Chancery, 1577, and Inquisition, 40 Elizabeth.)

Fourth alleged peerage: — James, Baron of Slane, was succeeded in his peerage by his cousin Thomas, the great grandson and then heir male of James, the twelfth Lord Slane. In 1556 he, as "Thomas Fleming, Lord Baron of Slane," prayed the Lord Chancellor that an inquisition might issue, to find what lands had descended to him from his ancestor (predecessor) Sir James Fleming, Knight, late Baron of Slane, which was, at the re-

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commendation of the justices, issued accordingly. (Chancery Pleadings). In the next year the Queen in a grant of livery styled him "Thomas Fleming, " Baron of Slane, cousin and heir of James Fleming, Knight, late Baron of Slane, deceased." (Fiant, 20 Elizabeth, No. 2748). In a royal commission, dated 26th December in the same year, (Patent Roll,) all the peers of the pale and the great officers of state are appointed conservators of the peace in various counties. Among the former is "Thomas, Lord Baron of Slane," who is named immediately after the viscounts, and at the head of the barons so commissioned.

Contrary to all these evidences, Mr. Bryan's case, on the death of James, the fourteenth Baron of Slane, creates a third abeyance, a fourth new title, and a fourth peerage; and in opposition to the Queen and the highest legal authorities, states that Thomas continued a commoner until he was summoned to Parliament eight years after the date of the aforesaid letters patent. In the list of the very Parliament (the first held after his succession), by his summons to which, Mr. Bryan's case asserts that he was created a new peer, he is ranked as the third Baron of Ireland.

Speaking of the descent of Thomas Lord Slane, and of the pedigree and succession of his cousin and successor, the case of Mr. Bryan, (page 18.) says, "the foregoing descent is proved by the " recitals of an inquisition of the 40th Elizabeth, " 1597, taken at Ratoath, before alluded to, which " states — ' that James Fleming, of Stephenstoun, " ' died, and was succeeded by his son Thomas, " ' who died without issue male, 9th November, " ' 1597, and was succeeded by his cousin, William

“ ‘ Fleming of Derpatrick.’ ” In the original inquisition, of which the above pretends to be a recital, the death of James Fleming, of Stephentown, is not mentioned, nor is it stated that Thomas succeeded any person, save James Baron of Slane. The following is the passage of the inquisition which notices the death of Thomas, and succession of William: “ The jury also say upon their oaths “ that the aforesaid Thomas Lord Baron of Slane, “ died on the 9th of November, A.D. 1597, with- “ out heirs male of his body, and that all “ and “ singular the lands, tenements, and hereditaments “ of which he was seized in virtue of the aforesaid “ charter, descended in remainder to William, now “ Lord Baron of Slane.”

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Fifth alleged peerage :—

Thomas, Baron of Slane, died leaving two daughters, his co-heirs, and was succeeded in his peerage, by his cousin William, the great-great-grandson, and then heir male of James, the twelfth Lord Slane, as is proved by the aforesaid recital from the Inquisition 40 Elizabeth.

Mr. Bryan's case is obliged, in consequence, to assert a fourth abeyance, but it declines to create a new peerage or a fresh title, until it arrives at the succession of William's son Christopher. It became therefore necessary to shew that William was not a peer, and the following is the method by which it is attempted to accomplish this object —(p. 18.) “ William Fleming, of Derpatrick, (the 17th “ baron, or lord of the manor, or barony of Slane,) “ succeeded his cousin in the manor, or barony of “ Slane, of which he had livery, 3 James I., 1605. “ He never was summoned to, or sat in, Parliament, “ but was called Baron of Slane, and Lord of Slane, “ as are the heirs of the Husseys Barons of Gal-

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“ trim, and of the Nangles Barons of Navan to this
“ day.”

In no one instance did the Crown ever recognize the Husseys or Nangles as peers, never were the privileges of the peerage conceded to them, never did they assume, and never were they styled by, the title of, lord, or lord baron. They are the very persons to whom Spenser alludes, (see page 84.) when he says, “ they were not afterwards lords, but only baronets, and sundry of them do yet retain the name.” Campion, Stanyhurst, and Camden, who all wrote their respective accounts of Ireland, about this time, gave lists of these “ baronets” or titular barons, as also of the lords of Parliament. Classed among the former, are the Husseys and the Nangles, but the Baron of Slane is placed high among the latter, with his proper rank and precedence.

The succession of William to the peerage, is, however, placed beyond doubt. Independently of the recital from the inquisition before quoted, King James, in a grant of livery dated in the third year of his reign, (Patent Roll of that year) styles him “ our well beloved and very noble (prœnobilem) subject, William Fleming, Lord Baron of Slane, cousin of Thomas Fleming, Knight, late Lord Baron of Slane, deceased.” In 1607, a bill was filed against him by a person of the name of Evers : as he then resided at the Castle of Slane, a commission was issued from the Court of Chancery directing the rector of Slane to take the answer, “ prœnobilis viri Willelmi Domini Baronis de Slane, super honorem suum.” The answer so taken upon honor is returned as that of “ the Right Honourable William Lord Baron of Slane.” It is unnecessary to remark, that to make answer to

bills in Chancery upon honor is the exclusive privilege of the peerage.

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In the report of Sir James Scarlett, upon Mr. Bryan's claim, appears the following passage—(case, page 33.) “it was stated to me that there “was no Parliament held in Ireland in the interval “between the year 1597, when Thomas Lord Slane “died, as above stated, and the year 1612, when “this William died.” It is submitted that the non-assembling of the Parliament during William's enjoyment of the peerage, which, independently of the admission, can be clearly proved, is a sufficient reason for his not having sat in that assembly, and therefore is not a conclusive proof, as the case assumes, that he was not a peer.

William Baron of Slane was succeeded by his son Christopher, as appears from a grant of livery, wherein the King styles him “Christopher Lord “Baron of Slane, son and heir of William Lord “Baron of Slane, late deceased.” (Patent Roll, 10 James I.)

To prove, in opposition to this record, that Christopher succeeded his mother instead of his father, the following entry, from the “funeral “entries of the nobility and gentry of Ireland,” was produced by Mr. Bryan's agent to the attorney-general, Sir James Scarlett, (case, page 34.) “Ellinor, “daughter of Sir Thomas Fleming, Knight, Lord “Baron of Slane, died ye 24th of Januarie, 1616; “she was wife to William Fleming, Lord Baron of “Slane, and mother, by him, to Christopher Fleming, Lord Baron of Slane.”

This document in fact contradicts the very assertion, which it is here alleged to have proved. In addition to it, the evidence of Lady Slane herself

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is upon record. In 1612, a bill was filed by Walter Stanley against her and her son Christopher Lord Slane, in which the following passage occurs:—
 “And your suppliant having desired the Right Honourable the now Lord Baron of Slane, and Ellinor Lady Dowager of Slane, executors of the last will and testament of the said William, late Lord Baron of Slane, to defend the cause.”
 The answer of Christopher is put in, as that of “Christopher, Lord Baron of Slane,” and in it, he states that he is not the executor of William, late Lord Baron of Slane: that of Ellinor is put in as “the answer of Elynor, Lady Dowager of Slane,” in it she says “that the said William, late Lord Baron of Slane, did dispose of the wardship,” &c.

These documents are perhaps superfluous, as Mr. Bryan, in his case, and Sir James Scarlett, in his report, not only admit, but adduce evidence to prove, that Christopher sat, as Lord Baron of Slane, in Parliament, in 1613, three years before his mother's death (Mr. Bryan's case, page 34.) They indeed confess that they are at a loss to decide, whether that sitting is to be considered as a new creation of a fifth peerage in fee, or as the descent of the pretended fourth peerage in fee, from Thomas to Christopher through his mother, who was then living, and asserted herself to be merely “Elynor Dowager Lady Slane,” as the widow of William, Lord Baron of Slane.

No evidence is produced in support of the hypothesis, which the report considers as the only alternative, namely, that if Christopher did not succeed his mother, he was created a new peer in fee, by enjoying exactly the same title, place and precedence in the Parliament of 1613, which his ancestors

held in the former parliaments of Ireland. The King, as has been shewn by the recitals from the grant of livery, recognised his succession to the peerage a year before any parliament had been held, since that of 27 Elizabeth. In 1615, his Majesty appointed him one of the commissioners under the Great Seal for dissolving the then parliament. The temporal peers so commissioned were Donogh Earl of Thomond; Jenico Viscount Gormanston; Christopher Lord Baron of Slane; Richard Lord Baron of Delvin; Luke Lord Baron of Killeen; Christopher Lord Baron of Howth; Robert Lord Baron of Trimleston; and Matthew Lord Baron of Louth. In this commission it is worthy of remark that Lord Slane is placed in the exact relative position amongst the most ancient barons which had been adjudged to his predecessor, David Lord Slane, by the parliament, 2 Edward IV. (Commons' Journals of Ireland, vol. i.) In addition to the opinion of the crown and the parliament, Lord Slane's own belief that he had succeeded to the peerage of his ancestors, can be adduced. In his answer to a bill filed against him in 1618, when speaking of certain lands, he says, "that the same is the ancient inheritance of him "and his ancestors lords of Slane, for many "hundred years." (Chancery Pleadings.)

The remarks upon the pretended sixth peerage of Mr. Bryan's case, will fall more appropriately under the next head, as both a royal act, and satisfactory proof of a sitting in parliament, are accidentally introduced into the discussion.

The whole history of these creations by writs of summons to the Irish parliaments becomes still more questionable, when we examine the grounds

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upon which they are gratuitously assumed. Mr. Bryan's case supposes, as an undoubted fact, that those who summoned the Irish parliaments possessed the power of creating peers at will. In this assumption the case errs against every principle both of history and constitutional law.

The most cursory perusal of any history of Ireland will afford sufficient evidence of the fact, that the parliaments of Ireland were summoned, and held, by the lords lieutenant and lords justices, and by their deputies, at their own option and pleasure, most generally without the intervention of, or any communication with, the King. Many authorities, historical, antiquarian, and legal, might be cited in proof of this fact; but it is apprehended that the authority of an Irish historian, together with that of an English lawyer, will be deemed sufficient. "The preamble," says Dr. Leland, "of an Irish act, 29th Henry VI. 'declares that ' 'the custom of Ireland is and hath been time ' 'out of memory, that no lieutenant, deputy, ' 'justice, or other governor, shall appoint, sup- ' 'port, or hold any parliament more than once a ' 'a year.' This preamble shews that the appoint- ' 'ment of these parliaments was from time imme- ' 'morial by the chief governor; nor can we con- ' 'trovert the recital of another Irish act, 11th ' 'Elizabeth, sess. 3. cap. 8. 'That before the ' 'statute of Poyning's, liberty was given to the ' 'governors to call parliaments at their pleasure.' 'Whether this was an incautious deviation from ' 'ancient usage, or whether the liberty was ori- ' 'ginally intrusted to the discretion of governors, ' 'seems not necessary to determine. It was exer- ' 'cised in the reign of Edward I., frequently in the

“ reigns of Henry VI. and Edward IV., and bills
 “ were passed or rejected by assent or dissent of
 “ the lords deputies, delivered in the royal style,
 “ without any previous communications with the
 “ King.” (History of Ireland, vol. ii. Appendix.)
 That this was not an incautious deviation from
 ancient usage appears from the statute 2 Richard
 III. (cap. 8.) which, speaking of the election of a
 governor of Ireland, enacts that it shall be made
 “ according to the tenor, usage, and execution
 “ of the said statute of Henry fitz Empress, with
 “ the assent of the nobles of this land, as is specified
 “ in the same statute, upon every such avoidance
 “ to choose a noble lord to be governor and have
 “ the government, as justice of Ireland, according
 “ to the ancient usage, used and executed from
 “ that time, and that it shall be lawful for such
 “ governor, so chosen, to hold parliaments and
 “ great councils, and what they shall do therein
 “ shall be as good and effectual in law, as if done
 “ by any other governor, in times past, provided
 “ that such election be made by the lords spiritual
 “ and temporal and the nobles of the land.”

Sir William Blackstone says, (Commentaries,
 vol. i. p. 102.) “ the original method of passing
 “ statutes in Ireland was nearly the same as in
 “ England, the chief governor holding parliaments
 “ at his pleasure, which enacted such laws as they
 “ thought proper.”

To maintain that the individuals who, at their
 pleasure, summoned those parliaments, could enno-
 ble commoners, by issuing writs to them in “ the
 “ royal style,” and could thus create as many
 peerages as they pleased, would, in the first place,
 be contrary to a fundamental maxim of consti-

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tutional law, which decides that no subject can ennoble a commoner, or create a peerage. Madox, in his *Baronia Anglica* (book i. cap. 1.) lays down as a fundamental principle of the Constitution, that "no man or number of men, without the King can, or ever could, make an earl or baron. To grant a baronial title is an act of regality inseparable from the crown, and incommunicable to subjects; that is, it was never yet communicated."

It would, in the second place, be contrary to every principle of policy and common sense, to suppose that a privilege so peculiarly regal was vested in men, the great majority of whom were themselves Irish peers, or English commoners. If the power of creating peers had been intrusted to the successive deputies who summoned and held parliaments, when and where they pleased in Ireland, from the reign of Henry II. to that of Henry VII., the temporal peers of Ireland would not have been reduced to the number of fifteen, which were all that the latter monarch found in existence on his accession.

Although Mr. Bryan creates his first five peerages without the intervention of any king, yet when in the fabrication of his sixth peerage, it becomes impossible to conceal the existence of the King's letter of the 30th of October, 1629: it is produced only for the purpose of treating the royal authority and signature with contempt. The King, (whether in strict accordance, or not, with the modern usages of the peerage, has no reference to the present question,) at the request of the elder brother, the rightful baron of Slane grants to the younger brother, during the legal incapacity of the elder, the conditional enjoyment of the ancient barony of

Slane, with the rank and privileges rightfully attached to it. The letter had merely an anticipatory effect, as to his succession to the peerage, and a declaratory effect, as to the past and future descent of the barony of Slane to the heirs male, but expressly denies the idea of a new creation. The case disclaims the royal authority, nullifies the King's letter, and creates a new peerage by the sole authority of the Lord Deputy; which peerage it claims for Mr. Bryan, in defiance equally of the royal will, as expressed in the King's letter, and of ancient usage; both of which had limited the barony of Slane to the male heirs.

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The proof which it adduces of this being a new creation, namely, that William Lord Slane was introduced between two peers, evinces ignorance, or misrepresentation, of the usages of the Irish House of Peers. A reference to the Lords' Journals will shew that, at the opening of the parliament on the preceding day, every hereditary peer who had not previously sat had been introduced with the same form; and as no parliament had been assembled for nineteen years, it was found that only three of the peers were entitled to be exempted from that ceremony.

It is evident from the whole proceedings, even as stated in the Attorney General's report, (pp. 34. 35, 36, and 37.) that neither the House of Peers nor the Lord Deputy treated the royal authority with the contempt which the report would insinuate, or attempted to usurp the power of creating peerages, which the report throughout assumes that they possessed. On the contrary, in perfect accordance with and obedience to the King's letter, they acceded to the claim which William Lord Slane

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preferred through his counsel : “ that his lordship “ might take his place in this high and honourable “ assembly of parliament as his said father and his “ ancestors, lords of Slane, have heretofore done.” But before issuing the writ to him, as heir to his father, and assigning to him the place and precedence, as Lord of Slane, which he claimed, the legal precaution was taken of presuming the death of the elder brother, although he was well known to be still living.

Thus the disregard of the royal authority and the dereliction of the principle that the King is the sole fountain of honour, which, according to Mr. Bryan’s case, pervaded the whole system of the government and peerage of Ireland, had in reality no existence.

And it deserves remark that, throughout the whole of the case and report, royal agency is never introduced or referred to, except for the purpose of charging it with some illegal, unjust, or arbitrary act, such as an illegal use of “ the dispensing power” in the distribution of peerages, continued unjust neglect of the rights of heirs general, or an arbitrary invasion of the privileges of the peerage, by depriving the great majority of the peers of the right of precedence arising from seniority of creation — a right which at all periods has been upheld by the peers of Ireland with the most jealous vigilance.

The third point has been incidentally shewn in the observations upon the first.—It may here, however, be generally remarked, that supposing such writs to have had the effect attributed to them, the only writ of summons produced in Mr. Bryan’s case, for six peerages, is that of Baldwin le Fleming, Lord Slane, its supposed first peer, to the parlia-

ment of the 3 Edw. II., which, as has been already shewn, was directed to commoners as well as peers, without having a creative effect, and the case itself states that "no evidence has been discovered to shew that Baldwyn attended this parliament, and it is probable that he did not." (P. 10.) The parliament pawn of 1585 is not a writ of summons, but a list of the peers of parliament. No evidence is offered of any sitting in the three first peerages.—The secondary evidence for the fourth and fifth is derived from a document in the keeping of Mr. Bryan's peerage agent, Sir William Betham. To the summons and sitting of the sixth is conceded their due weight.

The fourth point includes three considerations : The conduct of the heirs male of the family of Fleming from the earliest periods of record down to the present time—that of the heirs general, at four successive periods, in which they occurred,—and lastly, that of the crown and legislature in each case.

At what precise period, and in what particular form of creation, the ancient baronies of Ireland originated, would now be a question of as difficult solution as that of the origin of similar peerages in Scotland. Speaking of the latter, the Lords of Session in their report in 1739, to the House of Peers, upon the peerage of Lord Fraser of Lovat, declare them to have been created by some "method that cannot now, in matters so ancient, be with any certainty discovered. For a great many noble families appear, from the rolls of parliament, to have sat and voted in parliament as lords of parliament, though no constitution of the peerage, or title of honour, under which they

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“ sat, can be now found in the records.” Under these circumstances they had adjudged that peerage to descend, according to ancient usage, to the male heir. (Book of Sederunt, folio 347.)

From the claim advanced by Lord Gormanston in the parliament 38 Henry VI., and sanctioned by the act of that parliament; from that of Lord Kerry, sanctioned by the Lords Commissioners in 1615; and from the unanimous judgment of the House of Peers of Ireland in 1721, in favour of Gerald Lord Kinsale, who claimed the dignity of a peer of the realm and lord of parliament, as a prescriptive right which had vested in his ancestors, “ time out of mind,” the ancient baronies of Ireland may justly be considered as having existed from the time of Richard I., the period of prescription. The representatives of the family of Fleming, from their ancient and noble descent, and extensive possessions in both kingdoms, would naturally, soon after the invasion of Ireland, be considered by the crown amongst its nobles, or be speedily elevated to that rank. And, whether according to the terms prescribed in that creation, or in conformity with the usage which prevailed amongst the other coeval barons of Ireland, whose peerages of equally unascertained origin have descended to the present time exclusively in the line of their male heirs, the male descendants and representatives of Archenbald le Fleming, who settled in Ireland in the reign of King Henry II., have equally with the male heirs of the families of Birmingham, Courcy, Fitzmaurice, and Preston, always succeeded as a matter of right to the prescriptive enjoyment of the rank and dignity of peers of the realm and lords of parliament. Nor

does it appear that any opposition was ever made to such prescriptive right, either by the legislature or by the successive heirs general of the family of Fleming.

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It has been shewn above, that the respective heirs male of Christopher the ninth lord, of Thomas the eleventh lord, of James the fourteenth lord, and of Thomas the fifteenth lord, all succeeded immediately upon the demise of their predecessors, without hesitation, without opposition, and without acknowledgment of any favour conferred, to all the honours and privileges prescriptively annexed to the ancient peerage of Slane. In the case of the succession of David the tenth lord, as next heir male, the parliament did not allow him the place which he claimed above Lord Gormanston, because the latter proved that such precedency was not his right; but it adjudged to him the next place, namely, that which his ancestors, from time out of mind, had enjoyed. In the instance of the succession of James the twelfth lord, he was immediately after the death of his predecessor Thomas, although absent in England, recognised as a peer of parliament, and appointed sheriff of Meath by statute. Immediately on the death of James the fourteenth lord, without issue, but leaving two sisters his co-heirs, a royal commission was issued, in which Thomas the fifteenth lord, and next heir male, by the style and title of Thomas Lord Baron of Slane, is named next after the Viscount Baltinglas, and above all the other ancient barons of the pale. This is the Thomas from whose pretended creation in fee by writ of summons to the parliament of 1585, eight years subsequent to the date of this commission,

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Mr. Bryan's claim to the peerage originates. In a royal commission to dissolve the parliament of 1615, Christopher the seventeenth lord Slane, another of Mr. Bryan's new peers, is named in the same place.

In no one of these instances is the least intimation given that such precedence was allowed as a favour; on the contrary, every authority, both parliamentary and historical, concur in proving that such rank and precedence were uniformly claimed by the male heirs of the family of Fleming, and allowed as a right inherited from their ancestors, the successive barons of Slane. So pertinaciously, indeed, did they assert those rights, that in 1462, David Lord Slane would not acquiesce in the decision of the parliament, and, as is proved by the act 2 Edward IV., refused to take the seat adjudged to him. Nor does it appear that he, or James the twelfth lord, the male heir and successor of his son Thomas, the eleventh lord, who died in his minority, ever bowed to that decision, or took their seats in parliament, until Edward IV. removed the cause of dissension, by creating Lord Gormanston a viscount by patent. With similar feelings, Christopher the seventeenth lord Slane, the supposed new baron of the fifth creation of the case and report, so far from evincing gratitude to the Lord Deputy for the peerage, which, Mr. Bryan alleges, had been conferred upon him by that officer of the Crown, and for the act of gross injustice, towards the great majority of the peers of Ireland, that had been committed in his favour, by giving him a place amongst the ancient barons, to which, as a new peer, he could have no rightful claim, (and to which, if the supposed new barony

of 1585 was then in abeyance between his aunt and his mother, which is the other alternative of the Attorney General's report, he had no claim at all,) refused in the parliament of 1613, to sit below the Lord of Kerry, the third baron of Ireland. The decision upon this dispute is to be found in the book of cases of precedency, already produced before the house by Mr. Bryan. The Attorney General in his report is at a loss to decide whether his sitting upon this occasion created a new peerage in him, or was a termination of the abeyance between his aunt and his mother, who were both still living. In either case there was not a peer named in the commission for the dissolution of this parliament, formerly referred to, who would not have been entitled to a precedency far above him.

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The other two considerations may be briefly stated. It appears extraordinary that, during a space of 371 years, namely, from the commencement of the supposed abeyance between the two co-heirs of Christopher Lord Slane in 1457, to the period of Mr. Bryan's claim in 1828, all the various co-heirs of the respective Lords Slane, who were mostly married to men of rank, influence, and wealth, should have remained so ignorant of the important rights and privileges which they carried with them into the respective families into which they married, and that their husbands and descendants should have acquiesced so quietly in the successive extravagant pretensions of the respective new barons of Slane, to the rank and privileges of the ancient barony, which were always so liberally but so unjustly awarded to them, and which could be rightfully claimed only by such respective heirs general.

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But it is still more extraordinary that the Crown. the various lords deputy, and the successive legislatures, who must have been perfectly aware of the principles by which baronies in fee are regulated, should have countenanced and been parties to such a continued series of flagrant acts of injustice and oppression.

This course was repeated by the government in the last case of default of male issue in the barons of Slane, which occurred in the instance of Christopher Fleming, twenty-second baron of Slane, who, having taken part with King James II., was outlawed, and forfeited his honours and estates ; but by act of parliament, 8 Anne, (cap. 53.) was restored in blood and to the ancient barony of Slane, although not to his estates ; and was afterwards advanced to the dignity of Viscount Longford. He died on the 24th of July, 1726, leaving an only child, Helen. But although it is the law of the descent of a barony in fee, that when there is only one female heir, it is vested of right in such heir, and consequently after the death of the father of the said Helen, who had been restored to "his blood and title of honour only ;" if the barony of Slane had been a barony in fee, she was of right Baroness of Slane ; yet the government never considered her as entitled either to the ancient barony of Slane, nor to any of the baronies which, according to Mr. Bryan, have more recently emanated from it : on the contrary, the pension of 50*l.* a year, which was granted to her, was, until her death in 1748, paid to her simply as "Helen Fleming, daughter of the late Lord Viscount Longford." (State Papers, Dublin Castle.)

The consequences which would inevitably ensue

from the adoption of the principle upon which Mr. Bryan's claim is founded, are too manifest to require much illustration. If it be once established that the usage which has prevailed in Ireland for so many centuries, namely, that of determining the descent of its ancient baronies exclusively to the male heirs of their original possessors, is now to be superseded by the usage of England, which arose from circumstances totally dissimilar — if it be decided that the writs of summons issued for 500 years past to the parliaments of Ireland, which were assembled at the option of subjects not authorised to create peerages, ennobled the individuals so summoned, and created peerages in fee descendible to right heirs — and this can not be refused if Mr. Bryan's claim be allowed; that decision will be equivalent to the immediate and simultaneous creation of at least 200 peerages, of the existence of which, neither the legislatures of past times nor the parties concerned have been hitherto at all aware.

But without recurring to those who would be entitled to claim peerages in virtue of such creations previously to the accession of King Henry VII., endless confusion would arise in the present peerage of Ireland. The Baron of Trimleston would take precedency of all the hitherto supposed ancient barons, who now rank above him; for they would in such case descend amongst the junior barons, and be entitled to rank only according to the dates of the summons and sitting of the last heir male who succeeded in preference to the heirs general; but Lord Trimleston, so far from gaining precedency by the change, would be placed considerably below his present place; as a

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whole multitude of individuals who are now supposed to be commoners, but who are the right heirs of the various peers who were so summoned before the date of his patent, would take precedence of his lordship. One instance will be sufficient to illustrate the point.—De Courcy, Lord Kinsale, would descend from his present elevated position in the baronage, and be ranked only according to the date of the summons to his grandfather who has hitherto been supposed to have succeeded to that ancient barony as heir male, in 1762; whilst the various right heirs of previous lords of Kinsale would be placed, some above, and others below Lord Trimleston; unless all the heirs general claimed the same precedence which was allowed to their respective ancestors, in which case it might be found difficult to reconcile their various pretensions.

Another inevitable consequence of allowing Mr. Bryan's claim, would be to deprive the Duke of Leinster, the Marquesses of Lansdowne, Westmeath, and Ormonde, the Earls of Fingall and Howth, and Lord Kinsale, of their splendid ancient baronies, which they now enjoy solely as the male heirs of their predecessors; as not one of their lordships is the heir general of the person in whom their respective dignities vested in the reign of Henry VII.

It is alleged in the case and report, that Alice Lady Byrne, was the sole heiress of Helen Fleming, the only child of Christopher Viscount Longford, and twenty-second baron of Slane; but it appears from the Abbé Mc Geoghegan, who was cotemporary with, and seems to have been personally cognisant of the facts which he states, that Mary

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Fleming, the elder sister of Alice, did not die without issue. That historian says " Oliver O'Gara " was descended from the ancient house of the " O'Garas of Coolavin, in the county of Sligo, in " Ireland. The revolution in that kingdom having " compelled him to follow the fortunes of his king " into France, he married Mary Fleming, daughter " of the Lord Baron of Slane, the eighteenth peer " of Ireland of his family. O'Gara had four sons " by this marriage. The three eldest having " entered into the service of Spain, the first died " there with the rank of brigadier-general; the " second is colonel of the regiment of Hibernia, " and the third lieutenant-colonel of the regiment " of Irlandia. His conduct at the battle of Veletti " attracted on him the notice of his Catholic " Majesty, who rewarded him with a commandery " of the order of Calatrava. The fourth son of " Oliver O'Gara having attached himself to the " service of Leopold Duke of Lorraine, that prince " honoured him with the charge of master of the " horse to his two sons, of whom the eldest, when " he became emperor, raised him to the rank of one " of his privy councillors, and appointed him controller of the household of the princess, his sister." (*Histoire de l'Irlande par M. l'Abbé Mac Geoghegan*, vol. iii. p. 751, note.)

Mr. Bryan in his petition (page 25.) admitted the existence of the youngest of these sons, Charles; but upon discovering that the mother's will did not mention any children, he was omitted in the case and report.

Now that a poor widow who had four sons enjoying high rank and emoluments in foreign services, should have deemed it unnecessary to divide

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the few pounds of which she died possessed, amongst them, and should have preferred bestowing that small pittance upon those who had attended her declining years and death bed, may appear not a sufficient proof of the non-existence of four persons whose lives and fortunes are so circumstantially detailed by a cotemporary historian of approved veracity.

But without entering further into the circumstances of Mr. Bryan's pedigree, the present petitioner humbly contends, that even admitting that Mr. Bryan has proved himself to be the heir of Helen Fleming, the only child of Christopher Lord Slane, and Viscount Longford, that lady could inherit or convey to her heirs only that which her father himself was entitled to. Now Christopher Lord Slane evidently possessed the ancient barony of Slane, such as he inherited it from his ancestors, (for it is not pretended that any new barony was created in his person) and such as it had been enjoyed by his predecessors, with the same rights, privileges, precedency, and limitations, with which it had been awarded to them by the parliament of 1462 and by the King's letter of 1629.

He so inherited it as a barony in fee, or as a barony in tail male. If he enjoyed it as barony in fee, he succeeded to it without right, and consequently could convey no right in it to his daughter; for the right to the barony of Slane would in that case have vested in the descendants of the previous heirs general.

If he succeeded to it as a barony in tail male, (as it is humbly submitted has been shewn) the

said Helen has evidently no right to it, and consequently could impart no right to her heirs.

Whatever, therefore, be the nature of the barony of Slane, whether it be a barony in fee, or a barony in tail male, it is humbly submitted that Mr. Bryan can have no just pretensions to it.

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As a reply to the arguments and case of Mr. Fleming, an additional case was presented to the House on behalf of Mr. Bryan. The argument was as follows:—

The House is now called upon to determine, for the first time, whether the ancient baronies of Ireland are governed by the same principles of law as the ancient baronies by writ in England; or whether (notwithstanding that all dignities of Ireland were derived from the same fountain of honour as those of England, and that the common law in both countries is the same) there be, as Mr. Fleming alleges, a peculiar law that regulates the descent of Irish baronies.

As the common law of Ireland is, and always has been, the same as the common law of England*,

* Matthew Paris states, that "Henry the Second granted the laws of England to the people of Ireland, which were joyfully received by them all, and confirmed by the king, he having first received their oaths for the observance of them."

The probability of Henry the Second having, by statute, established the Courts of English Law in Ireland, whilst he was in that country, appears by the following copy of a writ of the 6th of John (on the patent roll in the Tower):—

"Rex Justiciario, Baronibus, Militibus, et omnibus fidelibus Hibernie, &c. salutem. Sciatis quod dedimus potestatem Justiciario nostro Hibernie, quod brevia sua current per totam terram nostram et potestatem nostram Hibernie, scilicet, breve de recto, de feodo dimidio militis, et infra, et de morte antecessoris, similiter de feodo dim. mil. et infra, et erit ter-

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and as there is no statute controlling the creations or descents of peerages of Ireland, those dignities

“ minus de morte antecessoris post transfretationem Henrici
 “ regis, patris nostri de Hibernia in Angliam. Et breve de
 “ nova disseisina cujus erit terminus post primam coronationem
 “ nostram apud Cantuariam. Et breve de fugitivis et nativis
 “ inde erit terminus post captionem Dublin, et breve de divisio-
 “ faciendis inter duas villas, exceptis baronibus. Et ideo vobis
 “ mandamus, et firmiter precipimus, quod hæc ita fieri et
 “ firmiter teneri per totam potestatem nostram Hiberniæ facia-
 “ tis. Teste meipso apud Westm. 11 die Novembria.”

The great charter of liberties of John was transmitted to Ireland in the 12th Hen. III. 1227, and the Lord Justiciary was then commanded to call before him the Archbishops, Bishops, Earls, Barons, Knights, and Freeholders, &c., and to command them to hold, observe, and put in force the said laws and customs of England, and also to cause proclamation to be made in every county of Ireland that the said laws and customs should be observed and obeyed. The writ for that purpose is as follows :—

“ Rex dilecto et fideli suo Richardo de Burgo, Justiciario
 “ suo Hiberniæ, salutem. Mandamus vobis firmiter precipientes,
 “ quatenus certo die et loco, faciatis venire coram vobis archi-
 “ episcopos, episcopos, abbates, priores, comites, et barones,
 “ milites, et libere tenentes et ballivos singulorum comitatum,
 “ et coram eis publice legi faciatis Cartam domini Johannis
 “ Regis, patris nostri, cui sigillum suum appensum est, quam
 “ fieri fecit et jurari a Magnatibus Hiberniæ de legibus et con-
 “ suetudinibus Angliæ observandis in Hibernia. Et precipiatis
 “ eis ex parte nostra quod leges illas et consuetudines in carta
 “ predicta contentas de cetero firmiter teneant et observant.
 “ Et hoc idem per singulos comitatus Hiberniæ clamari faciatis
 “ et teneri, prohibentes firmiter ex parte nostra et super foris-
 “ facturam nostram ne quis contra hoc mandatum nostrum
 “ venire presumat; eo excepto quod nec de morte nec de
 “ catallis Hibernensium occisorum nihil statuatur, ex parte
 “ nostra, citra quindecim dies, a die Sancti Michaelis, anno
 “ regni nostro 12^o super quo respectum dedimus magnatibus
 “ nostris Hiberniæ, usque ad terminum predictum. Teste
 “ meipso apud Westm. 8 die Maii, anno regni nostri 12^o.”

In the same year, the King, according to Matthew Paris, appointed Sheriffs and other ministers to govern the people of

must be presumed to have been created by the same means, and be subject to precisely the same

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Ireland according to the law of England, and to that end, "Ipse duxit secum viros discretos et lege peritos, quorum "communi consilio statuit et precepit leges Anglicanas teneri "in Hibernia," &c.

In the 30th Henry III. 1245, the following writ was issued to the Lord Justiciary of Ireland, confirming former Writs on this subject, and directing that all the writs current in England should likewise be made current in Ireland, under the King's new seal:—

"De Legibus Anglicanis in Hibernia tenendia.

"Rex, &c. Quia pro communi utilitate terræ Hiberniæ, et unitate terrarum Regis, Rex vult, et de communi consilio "Regis provisum est, quod omnes leges et consuetudines quæ "in regno Angliæ tenentur in Hibernia teneantur, et eadem "terra eisdem legibus subjaceat ac per easdem regatur, sicut "dominus Johannes Rex, cum ultimo esset in Hibernia, statuit "et fieri mandavit. Quia etiam Rex vult quod omnia brevia "de communi jure, quæ currunt in Anglia, similiter currant in "Hibernia, sub novo sigillo Regis mandatum est Archiepiscopo, &c. quod pro pace et tranquillitate ejusdem terræ, per "easdem leges eos regi et deduci permittant, et eos in omnibus "insequantur. In cujus, &c. Teste Rege, apud Wodestock, "9 die Septembris."

Prince Edward having issued a writ against the Bishop of Lismore, which was contrary to law, it was superseded in its effect by the following:—

"Rex Thesaurario et Baronibus de Scaccario, Dublin. salutem. Quia de assensu et voluntate prælatorum et magnatum terræ Hiberniæ, dudum fuit provisum et concessum, quod "eisdem legibus tenerentur in terra illa quibus homines regni "nostri utuntur in regno nostro Angliæ, quod eadem brevia, "quoad terras et tenementa recuperanda, teneant in terra illa, "quæ tenentur in regno predicto sicut justa. Et dicta provisio "et concessio omnibus retroactis temporibus fuerunt obtenta "et approbata, miramur quam plurimum quod (sicut ex insinuatione venerabilis patris Thomæ Lismorensis episcopi accepimus) emanare permisistis ex cancellaria Edwardi filii nostri "in Hibernia, contra consuetudinem obtentam et formam "brevium in regno nostro usitatam," &c. breve infra scriptum, &c.

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rules, as to enjoyment and descent, as peerages of England. The only modes recognised by law by which English peerages have ever originated or been created, are, at an early period, by tenure and by charters; and, subsequently to the reign of Henry the Third, by writ, and by patent, or charter.

Upon the question of tenure, very little need be said. Neither of the claims before the House is founded upon the barony of Slane being a barony by tenure; and although Mr. Fleming has put in evidence, with the view of proving that the tenants of the lordship of Slane were barons of the realm at a period when that dignity could only have existed by tenure, it does not appear how this (supposing it were established) could benefit his case.

The tenure of the manor of Slane never could have rendered its possessor a baron of the realm,

The following is a decision of the Court of King's Bench in England, extracted from the Placita Roll of the thirteenth year of King Edward the First, anno 1284, preserved in the Chapter House at Westminster:—

“Trinitat. anno decimo tertio. Majus Record.

“Placitum tangeñ. custod. terrarum et corporum eorum qui sunt infra etatem in quo continetur in fine ejusdem:—Et cum una et eadem lex esse debeat tam in regno Angliæ quam “Hiberniæ, ideo consideratum est,” &c.—Rot. 70.

In the 6th Richard II. the Commons stated, in a petition to the King, that “Vos ligees d'Ireland sont reulez et gouvernez “par les loyes, estatutz, et ordinances faitez en Engleterre, “auxi avant come ceux d'Engleterre.”

Lord Coke, speaking “of the kingdom of Ireland,” in the Fourth Institute, says,

“We shall not need undertake another work to write of the “Courts of Justice there, for they have the same which we “have in England, and the same law.”

since it was not held in capite of the Crown, but was a subinfeudation of the palatine lord of the county of Meath; and the heirs male of the Fleming family were summoned to parliament as peers when they were not seised of that manor. But, allowing that the lordship of Slane did render its possessor a baron of the realm at an early period (a point which is by no means conceded), it does not appear in what way that circumstance bears upon Mr. Fleming's claim. If, as it is alleged, the barony of Slane was originally a territorial honour, and the writs subsequently addressed to the Fleming family did not create an hereditary dignity, the inference is unavoidable that it must still be a barony by tenure, in which case the title belongs neither to the heir male of the family nor to the heir general; but was extinguished on the escheat of the land to the Crown, by the attainder of Christopher Lord Slane.

Had Mr. Fleming's claim been founded on tenure, it would have been intelligible, and might easily be answered; but he repudiates tenure, he repudiates a patent, and he repudiates writs and sittings in parliament, as the modes by which the barony was created, and rests his pretensions on a species of creation under which no dignity has ever hitherto been claimed either in England or Ireland—that of “prescription:” he points out what is the course of descent of baronies by “prescription,” and says that they are inheritable by male heirs alone, founding this peculiar mode of descent upon an assumed analogy to the descent of “feudal baronies.”

Neither “feudal baronies,” nor any other honours in England or Ireland, were ever confined

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to heirs male, until more than 100 years after the period to which he assigns the creation of the barony of Slane; all the lands in Ireland, as well as in England, the tenure of which rendered their possessors barons, in or before the reign of King John, were held under charters to the grantees and their heirs; and female heirs general, and their descendants, inherited the lands, notwithstanding the existence of heirs male of the original grantees. Among the many persons who, in the reign of King John, were undoubtedly barons by tenure, were Fitz-Walter, Roos, and Say; and in the character of barons, or "magnates," of England, they were appointed to enforce the observance of Magna Charta: but their baronies have not descended to their heirs male, or been considered to have existed as hereditary dignities, independently of the writs of summons addressed to the subsequent barons Fitz-Walter, Roos, or Say, because their ancestors were "magnates," before the time of legal memory. On the contrary, each of these honours has been adjudged to have been created by the first writ of summons on record; and each of them, too, has been inherited by, and adjudged to, female heirs general. That baronies existed by tenure beyond the time of legal memory is proved by these cases to have occurred in England as well as in Ireland; and these precedents show the manner in which the common law has regulated the descent of such honours. Upon what principle can it be argued, that in Ireland, where honours are derived from the same source as in England, and where the law is identical with that of England, a totally different practice must be considered to prevail? As, however, it is contended that the barony

of Slane, together with a few other ancient baronies of Ireland, descended to heirs male, by virtue of a peculiar custom in that country, which favoured male heirs; or, according to some writers, in consequence of an adherence to the feudal system, the barony of Slane "being," it is said, "a barony by tenure," it is material to investigate the evidence upon which these theories are founded; for, if it can be proved that "feudal baronies" in Ireland were never granted to heirs male, and that in all the early grants of earldoms, either in England or Ireland, the heirs general, and not the heirs male, of the grantees were to succeed, it is impossible to believe that a principle, totally at variance with the general usage, could ever have prevailed in the case of the barony of Slane, or of the few other baronies which are alluded to in Mr. Fleming's case.

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In every instance which has been discovered of grants of what are considered "feudal baronies" in Ireland, the habendum was uniformly to the grantee and his heirs. The first earldom granted in Ireland was that of Ulster to John de Courcy, the charter of which is not extant; but when King John conferred that earldom upon Hugh de Lacy in the sixth year of his reign, on the forfeiture of it by De Courcy, it was granted to him "et hæredibus suis;" and as he was to hold it as John de Courcy had done, it may be inferred that it had also been granted to De Courcy and "his heirs." The next earldom granted in Ireland was that of Carrick to Edmund le Botiller, in the 9 Edw. II. 1315, the limitation of which was to him and his heirs for ever. In England precisely the same custom prevailed; for of the numerous grants of

Honours in
Ireland and
England never
granted to
heirs male
until the
9th Edw. II.

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earldoms, from the time of the conquest until the reign of Edward the Second, not one was limited to "heirs male," but uniformly to the grantee's "heirs," or the "heirs of his body," or his heirs by a particular wife. If, then, as is manifest, the Crown, in conferring the higher and infinitely more important dignity of an earl, to which official duties were attached, evinced no consideration for male heirs; if in granting what are termed "feudal baronies," no reservation was made that the lands should be inherited exclusively by males; if, as was the case in numerous instances in England, earldoms as well as baronies were inherited by female heirs general, who transmitted the right to those honours to their descendants; if from the time when writs of summons to English parliaments are preserved, those writs have been deemed to have created baronies to the person first summoned, and the heirs of his body,—can it be reasonably contended, that in the instance of the barony of Slane the general principle was deviated from; and that, although the heirs, and not the heirs male, of every grantee upon record (whether of earldoms or of "feudal baronies," in England and Ireland), were the objects of the bounty of the Crown, until after the 10 Edw. II., yet that the barony of Slane must be supposed, by some visionary exercise of the royal prerogative, or by some imaginary custom, to have been created in an unprecedented manner, and with an unprecedented limitation?

Dignities first
limited to heirs
male.

The first time male heirs were ever mentioned in the creation of any dignity, was in the instance of the earldom of Kildare, in May, 9 Edw. II., 1316, when John Fitz-Thomas was created Earl of Kil-

dare, to hold to him and the heirs male of his body: the next instance was that of the earldom of Louth, in the 12 Edw. II.; and the third, that of the earldom of Carlisle, in the 15 Edw. II. No grant with such a limitation again occurred until the 2d November, 2 Edw. III., 1328, when Edmund le Botiller was created Earl of Ormond, to hold to him and the heirs male of his body; and in the 3 Edw. III., 1329, the Earl of Desmond was created, with the same remainder: but the next English dignity, which was limited to heirs male of the grantee's body, was in the 36 Edw. III., 1362. Thus, until the middle of the reign of King Edward the Second, there is no example of the creation of any dignity whatever, or of the grant of any lands to which the dignity of "peer" was attached, either in Ireland or England, to male heirs: but Mr. Fleming refers the creation of the barony of Slane to a period long before this time.

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The first creation of a baron by patent in England was in the 11th Rich. II. 1387, and the next in the 11th Hen. VI. 1433, forty-six years afterwards, both of which dignities were limited to heirs male of the body. Before the 11th Rich. II., as well as between that year and the 11th Hen. VI., numerous baronies were created by the writ addressed to the first baron, and were inherited by the heirs of his body.

Baronies by
patent first
created in
England in
1387.

No creation of a Baron of Ireland by patent is on record until the 2nd Edward IV. 1462, when Sir Robert Barnwall was created Baron of Trimleston, by a patent under the great seal of England, "ad essendum unum Baronum Parliamenti nostri infra terram nostram predictam," and to hold to

No baronies
by patent in
Ireland until
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him and the heirs male of his body. Unless therefore a writ of summons to, and sitting in the Parliament of Ireland, created an hereditary dignity, one of these two inferences is inevitable, neither of which can be reconciled with historical facts,—namely, that until the year 1462 there were no hereditary Parliamentary Baronies in Ireland; or that those baronies* alone were hereditary whose

**Remarks on the Baronies of Ireland which are cited in Mr. Fleming's case, as proof that the ancient Irish Baronies were inheritable by "heirs male" to the exclusion of "heirs general."*

1. — THE BARONY OF ATHENRY.

As a claim to this dignity is now pending before the House of Lords, it would not be proper to offer many observations respecting it.

According to the Claimant's printed case, the heir male succeeded to the barony on three occasions, to the exclusion of the heirs general. Of these instances the earliest took place before any writ of summons to the parliament of Ireland is preserved; and the proof adduced of Peter de Birmingham, who died in 1307, having been a peer, is by no means conclusive.† In neither of the other cases, in which it is alleged that there was an heir general of a Lord Athenry, does Mr. Fleming prove the fact by evidence.‡ In the reign of Queen Elizabeth,

† Mr. Birmingham's case, p. 5. — It is particularly to be observed, that contemporary with Peter de Birmingham, of Athenry, was a Peter de Birmingham, of Totmoye, a person of equal importance with the other; hence he might have been the individual alluded to as having been fined for non-attendance in parliament in 1282.

‡ For example: to show that John Birmingham, eldest son of the Thomas Lord Athenry who died in 1488, died before his father, leaving a daughter, Elizabeth, his heir, who married Piers Butler, ancestor of the Lords Cahir and Earls of Glengall, the following evidence is adduced:—

1st. That the Lords Cahir, now Earls of Glengall, "claim to be heirs general of the Lord Athenry, through that marriage."

2dly. That Lord Cahir "was allowed by Ulster King of Arms, in 1583, "to quarter the arms of the Lords Athenry."

3dly. That two manors which were in the possession of a Lord Athenry, in the 3d Henry IV. 1401–2, were found, "after the year 1500 to have "passed away from the family of Birmingham, and to be vested in the "Lords Cahir." [Printed Case, p. 7.], each of which circumstances, it must be obvious, might have happened from other causes than the marriage of the Lords Cahir's ancestor with the heir general of a baron of Athenry.

creations, like that of Slane (if Mr. Fleming's theory be correct), arose from some unknown

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Richard Birmingham is stated in Mr. Birmingham's case to have succeeded as cousin and heir male of a John Lord Athenry, to the exclusion of the daughter and heiress of the said Lord Athenry ; but from a passage in the printed case, a doubt seems to arise whether the ancient dignity was not surrendered by some act of the said Richard, and whether he was not created to a new dignity, with remainder to the heirs male of his body ; for it is said,—“ That Queen Elizabeth was well aware of the “ original limitation of the dignity which, in consequence of the “ subsequent loss of documents, can now be proved only by the “ continued usage and enjoyment, is evident from the letters “ patent which she granted to him in the tenth year of her “ reign ; and which, at his request, were enrolled in the Ex- “ chequer, ‘ in hæc verba,’ by order of the Barons of the

The second alleged instance of the heir male succeeding to the barony of Athenry, instead of the heir general, is that of John Lord Birmingham in the reign of Henry VIII. who, it is said, left a daughter and sole heir named Anne, who married William Legge, ancestor by her of the Earls of Dartmouth.

The only proofs of this statement, as adduced by Mr. Birmingham, are a pedigree of the Earls of Dartmouth in the hand-writing of the first Lord Dartmouth ; and secondly, a monumental inscription, in which that lady is called “ Ann Birmingham, of the truly noble and ancient family of the “ Birminghams of Athenree, in the kingdom of Ireland.” [Printed case, pp. 7, 8.]

Upon the pedigree in the hand-writing of Lord Dartmouth, which is called an “ authentic document,” and which appears to be the only authority for stating that Miles Lord Athenry “ was succeeded in the dignity by his “ son John, who must therefore have been the peer who attended the Parli- “ ament of 1541” [printed case, p. 8.], it is sufficient to observe, that Lord Dartmouth, the compiler of the said, “ authentic document,” lived in the reign of Queen Anne, more than one hundred years after the alliance in question took place, and that, in fact, his Lordship made no such statement.

The monumental inscription certainly states that Anne Birmingham was a member of the noble family of the Birminghams of Athenry, but it does not assert that she was the heiress of a Lord Athenry ; and the absence of such a statement tends to negative the presumption that she was so. It is, however, to be observed, that in the History of the Legge Family, in Collins's Peerage, that alliance is thus noticed :—“ William Legge, the “ second son of Thomas, went into Ireland, where he married Anne, only “ daughter of John, son of Miles Lord Birmingham of Athenree, and had “ issue by her, Edward his son and heir, and dying aged 92, was buried at “ Casils in Ireland ;” in neither of which works is it pretended that the said John Birmingham ever succeeded to the Baron of Athenry, or that he was the eldest son and heir, or the only son of his father Miles Lord Athenry, or that the said Ann was herself an heiress.

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source; and which, in defiance of the common law, and of the general principle that regulated

“ Exchequer. In these she directed her Deputy and Chancellor to receive the submission of the Lord Bretingham, of Anry, in Connaught, and the surrender and resignation of his name of Lord Bretingham, and of all his manors, castells, lordshippes, lands, tenements, seignories, rules, hereditaments, comodities, and profitts, with all and singular the appurtenances; to be regranted to the said Lord Bretingham and the heirs males of his body lawfully begotten and to be begotten.” From the said Richard Lord Athenry, the barony descended to the heirs of his body, Thomas Lord Athenry, who was created Earl of Louth, and died without issue male in 1799, leaving three daughters his coheirs. The question now is, whether the ancient barony of Athenry is in abeyance between those coheirs, or devolved on the heir male of the last Lord.

That in the opinion of the law officers of the Crown in Ireland, the heirs general are entitled, upon the principle that the barony is a dignity in fee tail, is manifested by the following extract from the report of the Attorney and Solicitor General of Ireland, on the petition of Thomas Birmingham Dale Henry Sewell, Esquire, son of one of the eldest of the coheirs, in the year 1800:—

“ Upon consideration of all the evidence, we are humbly of opinion that the Memorialist has fully proved the several allegations on which he professes to found his hopes and expectations, and that the barony of Athenry appearing to be the most ancient on the list of Barons, and being of so great antiquity, and consequently a Barony in fee, is now, as stated in the petition, in abeyance between the said Lady Elizabeth, the mother of the petitioner, the said Lady St. Lawrence, and the said Lady Wallscourt, and that it belongs now to his Majesty alone to determine whether the said barony shall continue in abeyance, or be vested in any of the said coheirresses, and whether his Majesty shall vouchsafe to bestow his consideration and favour on the petitioner, as the son of the eldest daughter of the last Lord Athenry, and his only male descendant.”

Hence the case of the barony of Athenry, so far from establishing any thing against Mr. Bryan's claim, tends materially

the descent of all other dignities whether by patent or by writ in Ireland or in England, could only be enjoyed by males.

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to support it ; because there is no proof that the heirs general of that dignity were ever excluded ; and, still more, because the right of the heirs general of the last Baron Athenry has been admitted by the law advisers of the crown ; who state as the grounds for their opinion, that as the barony was one of " great antiquity," it was " consequently a barony in fee."

2.—THE BARONY OF OFFALEY.

This barony or lordship came into the family of Fitz-Gerald early in the thirteenth century, by the marriage of Maurice Fitz-Gerald with Agnes de Valence, daughter and coheir of William de Valence, Earl of Pembroke, by his wife Joan, daughter and sole heir of Warren de Montchensy, by Lady Joane Marshall, daughter of William Marshall, Earl of Pembroke, by Isabella, daughter and heir of Richard de Clare, Earl of Pembroke, commonly called Strongbow, Lord of the Palatine of Leinster. The said Joan Marshall became one of the coheirs of her brother Anselm, Earl of Pembroke and Lord of Leinster, and brought to her husband, as her share of the lordship of Leinster, the county of Wexford, and the Baronies of Offaley and Geshil. She left issue by William de Valence three coheirs : Agnes, who received as her share Offaley and Geshil ; Isabella, who had Wexford, and was wife of John Lord Hastings ; and Joane, who married John Comyn, Lord of Badenoch, and had the lordship of Gainsborough, in England. Agnes was living a widow in 1288, and presented a clerk to the church of Geshil in that year. Her son Thomas was the first Lord of Offaley of the Fitz-Gerald family ; and his son John Fitz-Thomas was created Earl of Kildare by patent, dated 14th May, 1316, with remainder to the heirs male of his body. His descendant, Richard the fifth Earl, left an heir general, of whom there are descendants. Gerald, the twelfth Earl, and his son Thomas, the thirteenth Earl, were both attainted by Act of Parliament, and the latter was executed for rebellion in 1536, when the titles of Earl of Kildare and Baron of Offaley became forfeited to the Crown. Gerald Earl of Kildare, brother of Thomas the thirteenth Earl, was restored in blood only, and created *de novo* Earl of Kildare and

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Whether the Barony of Slane was or was not originally a barony by tenure, it cannot be con-

Baron of Offaley, by patent, dated at St. James's, on the 13th May, 1554: with remainder to the heirs male of his body. His eldest son, Gerald Lord Offaley (dying before his father), left an only daughter and heir, Lettice, who became the wife of Sir Robert Digby, Knt. This lady claimed the barony of Offaley as heir general, and after much dispute King James the First created her Baroness of Offaley, during her life, by patent dated 26th June, 1620. It is evident, however, that Lady Offaley had no legal claims to the dignity; because the only barony of which her father was seized was under the patent of 1554, which was limited to heirs male of the body of her ancestor, Thomas, Earl of Kildare.

There is no record of any person having ever been summoned to Parliament as "Baron of Offaley;" and the creation of Lettice, as Baroness of Offaley for life, affords another instance of the Crown creating persons to dignities of the same name, because the Barony of Offaley, created by the patent of 1554, was then vested in the Earl of Kildare, as heir male of the body of the grantee.

3. — THE BARONY OF KINSALE.

Mr. Fleming states, that in four instances the heir male of the family of De Courcy was allowed the barony of Kinsale instead of the heir general.

First in 1599, on the death of Gerald Lord Kinsale, who left a daughter and heiress named Mary, who was twice married. It is not, however, stated, much less proved, that she survived her father "who died in a very advanced age*," or that she had issue; but assuming that she did leave children, the rights of her heirs were not affected by the succession of the heir male to the title; and so far from the right of the said heir male being, as Mr. Fleming would infer, clear and unquestionable, serious doubts were then entertained with respect to his pretensions.

Sir Richard Cox, Lord Chancellor of Ireland in the reign of Queen Anne, whose high official situation afforded him access to all public muniments, states in his History of Ireland, that in the reign of James the First an objection was raised to De

* Lodge's Peerage of Ireland.

sidered a territorial honour, subsequently to the period when writs of summons are on record ; or

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Courcy sitting in Parliament, on the ground that the barony of Kinsale originated in a writ of Summons, and that he was not the heir general of the family. His words are,—

“ There had not been a Parliament in Ireland for twenty-seven years since the 27th Elizabeth, so that it was high time to call one now ; and the ministers of state were at work to manage that matter to the advantage of the English Protestant interest in that kingdom, which they saw would be opposed with might and main by all those of the Popish party ; and therefore they proposed that an order should be issued for every Parliament man to take the oath of supremacy, and that the Lords should declare their suffrages openly, content or not content, as in England, and not rise and whisper in the Lord Chancellor’s ear, as was the custom in Ireland ; and that the King should find some pretence to send for some few of those noblemen that would most briskly oppose his interest as Henry VIII. had formerly done ; and particularly that the Lord Courcy might not be suffered to sit in the House, because his ancestors were called by Writ, and so his honour being in fee simple did descend to daughters, who were heirs general of his family.”

What was done on the subject does not now appear. The dignity of which Lord Kinsale was possessed descended to the heir of his body Gerald Lord Kinsale, who died in 1642, and it is said, left a daughter and heiress, who married Patrick, son of Sir Thomas Gough ; but the title devolved on his brother. If she or her children were then living, which is very doubtful, they may have acquiesced in the succession of the heir male from ignorance of her right, from want of influence or money to prosecute her claim, or from various other causes ; but it is to be observed, that, if issue were then in existence of Mary the daughter of Gerald Lord Kinsale, who died in 1599, the said Mrs. Gough’s pretensions were only to a dignity created by the writ to her grandfather.

The third instance is said to have occurred on the decease of Almaricus Lord Kinsale in 1719, who, according to some statements, left a sister Ellen, the wife of Sir John Magrath,

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rather, perhaps, when a sitting in Parliament of a Lord Slane can be proved. Neither the law

when Gerald de Courcy, the next heir male, became Lord Kinsale; but there is reason to believe, that the heir of the said Almaricus Lord Kinsale was his cousin and heir male, Gerald de Courcy, because in the notice of the Petition of the said Gerald on the Lords' Journals of Ireland, claiming the dignity, he is called "cousin-german and heir *," instead of heir male.

The last instance occurred on the decease of the said Gerald Lord Kinsale in 1760, leaving four daughters his coheirs, when his cousin and heir male John de Courcy claimed and was allowed the Barony. The proceedings on that occasion prove, however, that the admission of the claim of the heir male arose from a misconception as to the nature of the dignity, which error appears to have long prevailed, and explains why the heirs general in 1569 and 1642 were passed over.

An idea undoubtedly prevailed, that the Barony of Kinsale was created by patent to William de Courcy, and the heirs male of his body, in the twentieth year of the reign of Richard the Second. Lodge, in his account of the family, says, "by the letters patent of that King, he received a confirmation of the honours and titles of Baron of Kinsale and Ringronet;" and the ancient pedigree, which is alluded to in the Report of the Law Officers of the Crown in Ireland in 1761, expressly refers to the enrolment of a patent of the 20th Richard II. That pedigree seems to have been the only evidence upon which the Attorney and Solicitor General of Ireland made their report in favour of the heir male, and it is not too much to infer, that the same document was used on former occasions, and with the same effect. The Report of the Attorney and Solicitor General of Ireland on the claim of John de Courcy in 1761 was as follows, and it affords a striking example of the loose manner in which claims to honours have sometimes been investigated:—

"In obedience to an order of reference bearing date the 6th day of March 1760, made by his Grace the Duke of Bedford, late Lord Lieutenant of Ireland, on the Petition of

* Lords' Journals, vol. ii. p. 696.

† Lodge's Peerage of Ireland, ed. 1754, vol. iv. p. 35.

of England, nor the law of Ireland, ever favoured heirs male to the exclusion of heirs general, in the

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“ John de Courcy, claiming the honour of Baron of Kingsale and Baron Courcy of Ringrone.

“ We have considered the said petition, and examined the evidence produced by the petitioner to support his claim, which appears to us as is hereinafter stated, viz.: the petitioner not being possessed of the patent, produced to us an attested copy of an entry in the Office of Arms in Ireland of a pedigree of the family of De Courcy, which is herein mentioned to have been copied from a manuscript of the late Earl of Totness, and which we have annexed to this our Report. This pedigree refers to the enrolment of a patent made in the 20th of Richard the Second to William Courcy, and deduces the dignity of Lord Kingsale from the said William, through a long line of the family of De Courcy to John de Courcy, who is therein mentioned to have been living in the year 1615, and to have had four sons; to wit, Gerald, Patrick, Edmund, and David. And we must beg leave to observe, that by the said pedigree Gerald Lord Courcy, the immediate predecessor of the said John, is mentioned to have died in the year 1599 without issue male, leaving one daughter, Mary, married to Donought Driscoll, on whose death the honour descended to the said John, his cousin. On consideration of the several pedigrees, certificates, and affidavits above mentioned, &c. we conceive it clearly appears that the baronies of Kingsale and Ringrone are antient baronies vested in the family of De Courcy, and have always descended in the male line of that family; that the said baronies, some time before the year 1627, became vested in John De Courcy, who left issue four sons, Gerald, Patrick, Edmund, and David; and that the issue male of Gerald, Patrick, and Edmond, the three eldest sons of the said John, is now extinct. And we are humbly of opinion that the petitioner has laid before us sufficient evidence to prove that he is heir male of the body of David, the fourth son of the said John Lord Courcy, Baron of Kingsale and Ringrone, and consequently is entitled to the honours of Lord Courcy and also of Baron of Kingsale and Baron of Ringrone, and to a writ of summons to call him to parliament as a peer of this realm; all which is humbly submitted to your Excellencies as our report this 27th day of August, 1761.

“ PHILIP TISDALL.
“ JOHN GORE.”

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inheritance of honours ; for in ancient times honours were always granted to heirs, and never to heirs

Upon inquiry it turns out that no patent of a creation or confirmation of the barony of Kingsale in the 20th Richard II. is on record, and that the only patent of that year to William de Courcy was a licence to import certain wines.

The report of the Law Officers in 1761, so far from supporting the opinion that the ancient Baronies of Ireland, which did not originate in a patent, are inheritable by heirs male only, admits of an immediately opposite inference. The existence of a patent was in that case presumed ; and the report being founded upon the impression that the dignity was created by a patent of the 20th Richard II. to William de Courcy, and the heirs male of his body, the only question was, whether the claimant was the heir male of the supposed grantee.

The descent of the barony of Kingsale to heirs male was therefore the effect of error,— of long standing, no doubt ; but still of a total misconception of the origin of the dignity, and that case is consequently not entitled to the slightest weight as a precedent in the question now before the House, as to the effect of a writ of summons to, and sitting in, the Parliament of Ireland, in the absence of a patent of creation.

4.—THE BARONY OF KERRY.

The heir male of the first Baron of Kerry was also his heir general until the death of Francis Thomas Fitz-Maurice, Baron and third Earl of Kerry, in 1818. His sister and heiress, Lady Anna Maria, who married Maurice Fitz-Gerald, Knight of Kerry, died without issue, when her cousin Henry, present Marquess of Lansdowne, grandson and heir of John Earl of Shelburne, second son of Thomas, Baron and first Earl of Kerry, became heir general of his family.

Mr. Fleming infers, that Lady Anna Fitz-Gerald, the sister of Francis third Earl of Kerry, did not succeed to the barony, but that it devolved on the heir male. This, however, is a gratuitous assumption. Lady Anna Fitz-Gerald was nearly eighty when the right to the Barony devolved on her, and had no children ; and that no claim should under such circumstances have been made, is not surprising. This case does not therefore afford the slightest support to Mr. Fleming's argument.

male; and heirs male have never been legally admitted to the succession of baronies, excepting

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5. — THE BARONY OF DELVIN.

The barony of Delvin originated in a writ of summons to the family of Fitz-John, and passed with the heiress of that house to the Nugents. Mr. Fleming says,—

“Thomas Nugent, the fourth Earl of Westmeath and thirteenth Baron of Delvin, died in 1752, leaving issue two daughters, Mary, married to Francis Lord Athenry, and Catherine, married to Andrew Nugent, Esquire, and was succeeded by his brother, John fifth Earl of Westmeath and fourteenth Baron of Delvin.”

That this statement is wholly unfounded in fact, appears from the annexed extracts from the reports of the Law Officers of the Crown in Ireland, on the respective petitions of Governor Nugent, one of the coheirs, in 1800, and of Andrew Nugent, Esquire, in 1814.

“Upon consideration of the whole of the evidence, we are of opinion, that the petitioner has proved all the material allegations of his petition; that the said barony of Delvin is an ancient barony in fee, and has already been inherited as such by a female; that the said barony is now in abeyance between the petitioner, as the sole heir of Lady Catherine Nugent, and the co-heiresses of Lady Mary Nugent, namely, Lady Elizabeth Duffield, the four daughters of Lady St. Lawrence, and Lady Wallscourt; and that it depends wholly upon His Majesty’s royal pleasure whether the said barony shall remain in abeyance, or shall vest in any of the said persons, and whether His Majesty shall, according to the prayer of the petition, and for the reason therein mentioned, or any other, grant the petitioner a writ of summons to sit in parliament in the ancient place of the Barons of Delvin, his ancestors.

“JOHN TOLER.

“JOHN STUART.

“November 3d, 1800.”

“ST. GEORGE DALY.

Extract from the Report of the Attorney and Solicitor General of Ireland on the Petition of Andrew Nugent, Esquire, in 1814.

“In obedience to your Excellency’s order of reference, bearing date at Dublin Castle the 24th day of January, 1814,

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under an express patent or charter creating the dignity.

"whereby the petition of Andrew Nugent, of Portaferry, in the county of Down, Esquire, claiming to be one of the co-heirs of Thomas Nugent, fourth Earl of Westmeath and Baron of Delvin, at whose death the said barony of Delvin is stated to have become in abeyance, was referred to us; and your Excellency was pleased to direct us to report our opinion as to what might be proper to be done thereon. Upon the whole of the case, we are of opinion that a barony in fee has been fully proved to have existed in the person of Thomas fourth Earl of Westmeath, Baron of Delvin; and further, we are of opinion that Andrew Nugent, Esquire, the petitioner, has proved himself to be one of the co-heirs of the said Earl Thomas, and has, to our satisfaction, fully made out the statement of his petition.

"WILLIAM SAURIN.

"CHARLES BUSHE."

These reports are most important to Mr. Bryan's claim, as they contain the opinion of the highest law authorities in Ireland, that a writ of summons to the parliament of Ireland created a barony in fee tail.

6. — BARONY OF KILLEEN.

Mr. Fleming's statement, that

"Justin Plunkett, the fifth Earl of Fingal and fourteenth Baron Killeen, died in 1734, leaving his three sisters, namely, Margaret, the wife of John Nugent, Esquire, Amelia, the wife of Robert Earl Nugent, and Mary, the wife of Maurice O'Connor, Esquire, his heirs, and was succeeded by his cousin, Robert, the sixth Earl of Fingal and fifteenth Baron Killeen,"

Is answered by the following report of the Attorney and Solicitor General of Ireland on the petition of one of the co-heirs in March, 1813:

"In obedience to your Grace's order of reference, bearing date at Dublin Castle the 15th day of November, 1811, whereby the memorial of Maurice O'Connor, of Mount Pleasant in the King's County, Esquire, claiming the title and honours of Baron of Killeen, was referred to us, &c.: Upon the whole of the case it appears to us that a barony

With respect to a patent, in relation to the barony of Slane, it is not pretended that such an instrument exists: the same rule of law must therefore come into operation as if it were an English barony; and in the absence of a patent it must be held to have been created by writ, that being the only other mode known to the law by which a barony can be called into existence.

To controvert this proposition, founded as it is

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" in fee was created by the writ to and sitting in parliament
 " of Richard Tuit, and that the same was enjoyed and exercised by his heirs and by Christopher Plunket as such, and
 " after his death became in abeyance among his three
 " daughters; but it having appeared to us that James Plunket,
 " the brother of the said Christopher, and his heirs male, sat in
 " parliament as Barons of Killeen, and that the memorialist is
 " the heir general of the said James, we humbly conceive
 " that the question thereupon arising, whether the said James
 " and his heirs were not thereby ennobled, and did not thereby
 " acquire a barony in fee, is fit and proper to be submitted to
 " the consideration and decision of the House of Lords.

" WILLIAM SAURIN.

" March 13th, 1813.

" CHARLES BUSHE."

7. — BARONY OF HOWTH.

It is said, in Mr. Fleming's case, that

" Edward St. Lawrence, the eighteenth Baron of Howth,
 " died in 1549, leaving issue two daughters: Anne, married to
 " Bartholomew Dillon, Esquire, and Allison, married to John
 " Golding, Esquire; and was succeeded by his brother Sir
 " Richard, the nineteenth Lord Howth."

This statement is easily answered. The dignity of which Edward Lord Howth died seised, having fallen into abeyance between his said daughters and co-heirs, no claim to the barony as a matter of right could be made; and the Crown, instead of terminating the abeyance, created a new dignity in the heir male, who inherited the lands.

There are many similar instances in the Peerage of England. See page 182 & *seq.*

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upon the highest legal authority; upon the repeated decisions of the House of Lords of England, as well as upon the decision of the House of Lords of Ireland*; and upon the identity of the common law of Ireland and England. The principal fact upon which Mr. Fleming relies as evidence is, that the barony of Slane was an ancient barony, limited in its descent to heirs male; and that on five occasions, when a Lord Slane left more than one heir general, the next heir male was summoned to parliament, and allowed a higher precedency than could be derived from the date of the first writ addressed to him. It is not denied that the heirs male were summoned to parliament as Barons of Slane on these occasions; and it is conceded that they were allowed a higher precedency than belonged to them, if, as Mr. Bryan contends, they were respectively created to distinct baronies of Slane. The fallacy of deducing from these circumstances the inference that the heirs general were not entitled to the dignities created to their immediate ancestors, or that the allowance of precedency is conclusive against a claim by heirs general, is, however, apparent from the following facts:—

The first writ of summons to a parliament of Ireland on record, to a person of the name of Fleming, is that of the 3d Edward II. 1309, which was addressed to Baldwin le Fleming, who was summoned to a parliament at Kilkenny in that year, by the designation of “Baldwin le Fleming;” but no proof exists that he sat in parliament. He was succeeded by his son, Sir Simon le Fleming, who was summoned to and sat in parliament; and

* The case of the barony of Le Poer, post, p. 178.

on his death in 1370, his son Thomas le Fleming, then a minor, became the third baron. Dying in the 13th Hen. VI. 1434, he was succeeded by his son and heir Christopher Fleming, the fourth baron, who sat in parliament, and died in the 26th Hen. VI. 1447, leaving his grandson and heir, Christopher Fleming, the fifth baron. In November 29th Hen. VI. 1450, a question arose in the great council held at Dublin between this baron and Sir Robert Preston, Lord of Gormanston, as to precedency, which was determined in favour of Lord Slane by James Earl of Ormond, then Lord Deputy of Ireland; but in the 38th Hen. VI.* Lord Gormanston agitated the question in parliament, and obtained an act, which recited that “Whereas he and his ancestors in the time of “Richard, late King of England†, had been Lords

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* Statutes of Ireland, 38 H. VI. c. 30. Printed Evidence, No. IV. p. 26.

† “Richard jaditz Roi d’ Engleterre.” As an argument is built upon the error that the barony of Gormanston and the barony of Slane existed “in the time of Richard the First, or beyond legal memory,” the following facts are stated, to show the impossibility of the hypothesis that King Richard the First was the monarch alluded to. The act of the 2d Edw. IV. does not trace the creation of the barony of Slane beyond Simon Fleming, Baron of Slane, who died in 1370, or that of Gormanston beyond Robert Preston, who was Chief Justice of the Common Pleas in Ireland and Lord of Gormanston in the latter part of the reign of Edward the Third, and in that of Richard the Second; nor is it possible that he could have been Lord of Gormanston before the 37th Edw. III., as he purchased the said manor in that year of Almaric de St. Amand. A reference could not be made to sittings in the Parliament of Ireland, in the time of Richard the First; for Richard never was King or Lord of Ireland, and the English laws were not generally established there until the 6th of John.

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“ of Gormanston and barons of the parliaments of
 “ the said land, and had their places in the parlia-
 “ ments and great councils therein held, with the
 “ precedence thereunto appertaining, above any
 “ Baron of Slane, until the time of the great coun-
 “ cil held at Dublin on Friday next before the feast
 “ of St. Andrew the Apostle, in the 29th year of
 “ the reign of King Henry the Sixth, before James
 “ Botiller, late Earl of Ormond, then deputy to
 “ the high and mighty Prince Richard Duke of
 “ York, then Lieutenant of the land of Ireland ;
 “ and the said Earl intending the dishonour and
 “ rebuke of the said Sir Robert on that occasion,
 “ imperiously commanded, without proper deliber-
 “ ation, the said Sir Robert, under heavy pains
 “ and penalties, and under perilous and evil threats,
 “ to take his place and seat in the said council
 “ below Christopher then Baron of Slane, without
 “ any examination or investigation of the demand
 “ of the said Sir Robert to pre-eminence, which
 “ he claimed ; publicly praying and requiring the
 “ said Earl in no wise to proceed in such judg-
 “ ment, to the injury and prejudice of his said
 “ title, against law and right. To which the said
 “ Earl, not paying any attention to any thing be-
 “ sides the unbounded execution of his said malice
 “ at that time, oftentimes commanded the said

Moreover, the whole language of the statute clearly proves that Richard the Second was intended ; and by “jaditz,” the King Richard who lived more than two centuries and a half before, instead of the sovereign who died only sixty years preceding, could not be referred to. In the statute of the 2d Edw. IV., Henry the Sixth is called “Jaditz Roy d’En-“gleterre.” Printed Evidence, No. IV. p. 28.

“ Robert to obey his mandate to sit in the said
 “ place, in such terrible manner and form as caused
 “ him from fear and compulsion alone to obey by
 “ so doing, he first protesting that he neither did
 “ nor would take that place or seat in derogation
 “ of his title which of right he had to sit above the
 “ said Baron in the said parliaments and councils,
 “ he not denying that he there sat; but it was
 “ solely from fear of the said Earl, and to avoid
 “ the jeopardies and inconveniences of the execu-
 “ tion of his said threats; and he now prays, that
 “ notwithstanding that he so took his seat at that
 “ time for that cause, it ought not to be taken as
 “ an example or precedent to the injury or preju-
 “ dice of himself or his heirs hereafter, and that it
 “ be so enacted in the said council. Upon con-
 “ sideration of the premises it is enacted and
 “ ordained in the said parliament, and by the autho-
 “ rity of the same, that the said Sir Robert shall
 “ have his place in all parliaments and great coun-
 “ cils to be holden in the said land, as his father
 “ and grandfather had heretofore; and that the
 “ sitting of the said Sir Robert in the said council
 “ by the said compulsive commandment of the
 “ said Earl’s ill-will, against equity or justice, shall
 “ not be taken for a precedent or matter of record
 “ against him or his heirs hereafter.”

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In the 38th Hen. VI., Christopher Lord Slane had been dead two years. The dignity of which he was possessed is presumed to have been in abeyance; and, so far as can be inferred from the words of the statute above cited, Lord Gormanston’s pretensions were undisputed. If, however, a note in a manuscript in the handwriting of the celebrated Camden, then Clarenceux King of Arms, in the

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British Museum, may be relied upon (and the fact that many records which were accessible in the reign of James the First have since perished entitles the statement to attention), a special reservation was made by parliament in the 38th Hen. VI. of the rights of one of the heirs general of the said Christopher Lord Slane; for Camden states, "We find that in the time of King Henry " the Sixth the Baron of Slane had place assigned " him in parliament, with reservation it should not " prejudice Walter Dillon or Thomas Fleming in " England." *

* *Copies of Papers relative to the Barony of Slane, in the British Museum.*

" A baron by writt or created by lres patent, if he fail in " lyneall heires males, & have coheires, the dignitie is deter- " mined in those coheires untill the King please to recreate the " heire or husband of one of the daughters (the other having no " issue); neither is the elder of more power here then the " yongest; but as the King pleaseth or liketh y^t pson he " createth, w^{ch} must be sued also by special petiçon to his " Ma^{tie}. The Baron of Slane, viz. John Fleming, had no " heires males, but coheires: th' one, viz. Anne, married " Walter Dillon — th' other, viz. Amy, married John Bealewe, " both having severall issue now living; and lately, Thomas " Fleming had no issue masle, but had 2 daughters, Elynor, " married to Wilt. Fleming, this Baron's father, by w^{ch} he " claymeth, — Katherine, married Pierce Butler, by whome she " hath issue living; soe as, by thease two severall coheires, the " dignitey (if it had been) of the Barone of Slaine is wholly, by " all lawe and custome, extinct."

11th November, 1614.

" The King awarded co^mission, under the Broad Seale of " England, to the Lo. Deputie & Counsell of Ireland, to settle " and determine controversies of this nature [precedency] the " last Parliamēt; who by vertue therof called the Lordes of " Kierry and Slane before them, and having maturely heard

On the death of the said Christopher Lord Slane without issue in the 36th Hen. VI. 1457, the

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First abeyance
of the barony
of Slane.

" & examined the Allegacons of both aydes the 11th of
" Novemb. 1614, did order that the Lo. Kierry should hold his
" precedence of the Ba. of Slaine untill he shewed better
" matter, and further day was given him therunto."

18th November, 1614.

The cause again heard, and confirmed in favour of Lord Kerry.

[Cottonian MS. in the British Museum. Titus, C. x. fo. 64. b.]

By vertue of that authoritie wch his Ma'tie hath given unto us as Commissioners for th' office of Earle Marshall, we have taken into o^r consideration the tytle of precedence in controverisie betwixt the Lord Barron of Keyry, commonly called the Lo. of Licksnawe and the Lo. Baron of Slane; and having heard the severall allegations, as well on the one side as th' other, wth th' answers and replies of their learned Councell, fully and at large, we are of opinyon (for anything yet appearing unto us) that the clayme made by the said Lo. of Keyry is just and woll grounded; and that the said Lo. of Keyry, and his heires L'ds of Keyry, ought and are to have place and p'cedence above the said Barron of Slane, and his heires as Barons of Slane, at all Sessiones of Parliam^t., and other assemblies and meetinges publique and privat wheresoever, and consequently of all other noblemen that are in ranck inferior, and have given place to the said Lo. Baron of Slane. And accordingly do so order the same, untill the said Baron or Barons of Slane do produce better matter to the contrary before us his Ma'ties Commissioners here; wch wee have thought good to signifie unto yo^r Lo'ps and the rest of his Ma'ties Councell here, that as occasion shal be offered, you may in the meane tyme allowe the said Lo. of Keyry, such place as by us is here assigned unto him. And so we bid yo^r Lo'ps, &c.

(Signed by)

LO. THRESURER,
LO. PRIVIE SEALE,
LO. STEWARD,
LO. ADMIRALL,
LO. CHAMBERLAYNE.

17^o Januarii, 1615.

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barony of which he was seised fell into abeyance between his sisters and co-heirs, namely, Anne the

(Addressed)

"To our good Lo^d the L^{ds} Justices and the rest of his
"M^{tes} Councill of Ireland."

(Indorsed)

"The L^ds Commission^{rs} Marshall^e l^{fe} for the Lo. of
"Keyry against Slane."

"For Mr. Clarenceux."

On the opposite side to fo. 10. is a memorandum respecting the inquiry of precedence, thus —

"For precedence of the Lo. of Kerry before the Baron of
"Slane there are extant a Parliament Rolle, in the time of
"Qu. Mary, in the hands of Ulster, now King of Armes in
"Ireland; a Certificat of Ulster to the Earle of Sussex, Lo.
"Lieutenant of Ireland, 1563; and Mr. Stainhurst, a learned
"antiquarie of that nation, approveth the same in his description
"of Ireland."

[Cottonian MS. Faustina, C. viii. fo. 9. b.]

[*The following Statement is in the hand-writing of Camden,
Clarenceux King of Arms.*]

"The pedegree of the Baron of Slane, delivered by Mr.
"Christopher Darcy, seemeth to us, as he himself acknowledg-
"eth, to be conjecturall, and is imperfect, by the omission of
"the heires generall in the right line, not only in former tyme,
"when one of the heires general was married to Dillon, and
"another to Belleaw, in the county of Devon, but also in late
"tymes.

"That the name of Fleming, or Flandrensis, is ancient in
"Ireland, we acknowledge; for we finde that at the conquest
"thereof Hugh Lacy erected a Castle upon the river of Barrow
"for Thomas Fleming; and whereas K. Henry the 2. gave the
"countrie of Meth to Hugh Lacy, the sayd Hugh infeofed divers
"that followed him with Baronies, and among other, R. Fleming
"with the Barony of Slane.

"We are herunto probably induced by the tenure of that
"Barony. For whereas parte of the inheritance of Lacy, in
"Meth, descended to the Verdons, and from them by foure

wife of Walter Dillon, Esquire, and Amia the wife of John Bellew, both of whom left descendants. It is therefore evident that no claim to the dignity as a matter of right could be urged by either of these co-heirs; and consequently the non-claim to the first parliamentary barony in the Fleming family does not justify the inference which has been drawn from it, that the title devolved on the heir male. It appears, moreover, from the record cited by Camden, that so far from the heirs general having no right to the barony, the interests therein of one of them were specially recognized and protected.

By virtue of an entail, the manor, or, as (in common with numerous other lands, both in England and in Ireland) it was termed, the barony of Slane, devolved on the heir male, David Fleming, who was the cousin of the last baron. This individual was summoned to parliament as Baron of Slane, in or before the 2d Edw. IV. 1463, in which year Robert Lord Gormanston revived the question of his right to precedency above the

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Second barony
of Slane,
created by writ
in 1463.

“co-heires to Furnivall, Burghersh, Crophull, and Ferrers of Groby; Simon Fleming, Baron of Slane, held his Baronie of Slane of Sir Bartholomew de Burghersh, as appeareth by inquisition after the death of the sayd Sir Simon Fleming, the 45th yere of K. Edward the Third. Soe that he seemeth to be a feudall Baron, and not a Lord of Parliament.

“At what tyme the Baron of Slane was sōmoned to Parliament Mr. Darcy doth not specifie. This we finde:—first, that in the tyme of K. Henry the 6. the Baron of Slane had place assigned him in Parliament, with a reservacōn it should not prejudice Walter Dillon and Thomas Fleming in England;—secondly, that in the time of K. Henry the 7th he was ranked in a procession at Greenwich: he had place next after the Lord Delvin, and before the Lord Killin, as appeareth by the Booke of Houth.”

[Cottonian MS. British Museum. Faustina, C. viii. fo. 11.]

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Lords of Slane. The proceedings on the subject are of the utmost importance, because they prove that the barony of Slane, which was vested in David Lord Slane, was limited to his heirs, and not to his heirs male; and because they establish that writs of summons to the parliaments of Ireland were then deemed to create hereditary baronies to the heirs of the person so summoned.

The statute of the 2d Edw. IV. cap. 15. recites, at the petition of Robert Preston, Knight, Lord of Gormanston, "that lately in a parliament held at Drogheda, and afterwards adjourned to Dublin, and there finished before the most high and mighty Prince Richard Duke of York, then being Lieutenant of Ireland, on Friday next after the feast of St. Blase the Bishop, in the 38th year of the reign of King Henry the Sixth, late King of England, at the supplication of the said Sir Robert, it was ordained by the authority of the same parliament, that he and his heirs should have and enjoy such place of sitting in parliaments and great councils as his father and grandfather had and enjoyed. And for that it is well known to divers persons of honour in this land, whose names were contained in a schedule annexed to a bill by the said Sir Robert brought into the said parliament, and thereafter written, that Christopher Preston, Knight, father of the said Sir Robert, sat in parliaments and great councils above Sir Christopher Fleming, Baron of Slane; and Sir Christopher Preston, grandfather of the said Robert, sat above Sir Thomas Fleming, then Baron of Slane; and Sir Robert Preston, great grandfather of the said Robert, sat above Sir Simon Fleming, then Baron of

“Slane; and also that Sir David Fleming, Knight, now Baron of Slane, absents himself from parliaments and great councils, with the intent that the aforesaid persons, who should come and know the seat of their ancestors, should die before the matter aforesaid was duly examined, according to the tenor of the aforesaid act: upon consideration of the premises, and the persons aforesaid having been examined as to the facts, it was found by examination that this Act containeth the truth. It is ordained, established, and adjudged, by the authority of the said parliament, that the said Sir Robert and his heirs, as Lords of Kelles in Ossory, should have their places in parliaments and grand councils, to sit above David Fleming, now Baron of Slane, and his heirs, and all other Barons of Slane who shall be hereafter.”*

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There is in this statute an express recognition, amounting almost to a legislative enactment, that the barony of Slane, of which David Lord Slane was possessed, was limited to his heirs, which statement was strictly accordant with the principle that then and always regulated the descent of baronies by writ in England. The state of the English peerage at the time when the statute of the 2d Edw. IV. passed, tends still further to prove that baronies which were not created by patent were inheritable by heirs general. In that year thirty-

Second barony
of Slane vested
in heirs
general.

* Then follow the names of “Sir Thomas Bath, Lord of Louth; Thomas Plunket, Knight; Christopher Plunket, Knight; Robert Dovedale, Knight; Nicholas Strangways, Esquire; John Capron; Nicholas Hardeman, Esquire; and “divers others,” who appear to have given evidence on the subject.

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seven barons were summoned to parliament. Of these five were created by patent, and one (Vescy) by writ*, with remainder to heirs male of the body: the remaining thirty-one were baronies by writ; of which number five† had been inherited through females; and no less than five barons‡ were summoned to that parliament in right of their wives, who were heirs general of barons created by writs of summons.

If, as Mr. Fleming contends, baronies existed in Ireland, which were confined in their descent to heirs male at the period to which he attributes the creation of the barony of Slane, it is incumbent upon him to state specifically by what means they were created. That such a custom was then unknown in, and that it was in direct opposition to the usage of this country, has been proved; and that the barony of Slane, and others to which allusion is made, could not have been created by patent, is beyond a doubt, because no patent of creation of a baron before the 11th Ric. II. is extant in either kingdom. To the assertions that

* Appendix to the First Report of the Lords' Committee on the Dignity of a Peer of the Realm.

† Audley, Cobham, Dudley, Dacre, and Say and Sele.

‡ Fitz-Warine, Ferrers of Chartley, Scales, Cromwell, and Willoughby of Eresby. The twenty-one other baronies by writ, in the 2d Edw. IV., were then possessed by heirs male, who were also the heirs general of the persons first summoned; but many of the said twenty-one baronies have since descended to heirs female, and five of them, namely, Clinton, Hastings, Zouch, Grey of Ruthyn, and Herbert, exist at the present moment, in the persons of heirs general; the remainder being in abeyance or in the Crown under attainder, excepting the barony of Scrope of Bolton, which is vested in a sole heir general, but who has not preferred his claim to the dignity.

there is something peculiar in the creation of the barony of Slane, which takes it out of the ordinary rules respecting the descent of honours; that it existed independently both of a patent and of writs of summons; and that, although no man knows precisely when, or how, it was created, yet that, in opposition to the laws which govern the descent of all other dignities, it is inheritable by heirs male to the exclusion of heirs general, there is this conclusive answer; namely, that in the instance of the first heir male, who was summoned to parliament as Baron of Slane whilst there were heirs general of previous Barons, there is an express statute of the Irish parliament* which declares that the dignity of which he was possessed was vested in him and his heirs. By what means a dignity to which it is pretended a person succeeded as heir male, and which it is said was confined in its descent to heirs male, could be vested in him and his heirs, Mr. Fleming has not pointed out; and it also remains for him to shew how David Lord Slane could have been possessed of the barony in the 2d Edw. IV. to him and his heirs, unless it were created by the writs of summons which were addressed to him, and a sitting in parliament under those writs.

It is material to inquire what was the nature of the barony of Gormanston, the possessor of which twice contested the right of precedency with the Barons of Slane. That it was not created by patent is unquestionable, because, in that case, there could have been no difficulty in settling the precedency, from the date of the patent; and because the earliest patent of the creation of a

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* Stat. 2 Edw. IV. cap. 15.

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barony of Ireland was in the 2d Edw. IV. 1462: nor can it be said that it was a feudal, or even an ancient dignity, because the title was unknown until the reign of Richard the Second; and still more, because it was decided that the barony of Gormanston did not confer a high precedence. The conclusion seems therefore irresistible, that it was created by writ; and as it cannot be denied that the heirs (who were also the heirs male) of the first Baron of Gormanston succeeded to the dignity, there is proof, to which no suspicion can be attached, that a writ to and a sitting in the parliament of Ireland, in the reign of Richard the Second, did create an hereditary barony.

The first person summoned to parliament by the title of "Gormanston," was Christopher Preston, in the reign of Richard the Second. He was the son of Sir Robert Preston, Chief Justice of the Common Pleas in Ireland (who was summoned *ex officio* in the reigns of King Edward the Third and Richard the Second, but appears latterly to have sat in the precedence of the barony of Kells in Ossory, in right of his wife), by Margaret, daughter and eventually sole heiress of Walter de Birmingham, who was summoned to parliament as Lord of Kells in Ossory, in the middle of the reign of King Edward the Third. The barony of Kells, on the death of Margaret, wife of Sir Robert Preston, descended to their son, Christopher Preston, who was summoned to and sat in parliament as Lord Gormanston, but apparently in the precedence of the barony of Kells.* He was

* Similar circumstances occurred in the peerage of England. The Lords Willoughby de Eresby, though summoned by the title of "Willoughby," have always enjoyed the precedence of the barony of Beke; and other instances might be cited.

succeeded by his son Christopher Preston ; and he by his son Robert Preston, who was summoned to and sat in parliament, in the reign of Henry the Sixth. It is evident, from the statutes of the 38th Hen. VI. and 2d Edw. IV., that the Lords Gormanston always enjoyed a higher precedency than the Lords Slane ; not, however, by virtue of the barony of Gormanston, but, as the stat. 2 Edw. IV. expressly asserts, "as Lords of Kells in Ossory." This recognition that the barony of Kells in Ossory was vested in the Lords of Gormanston ; that it was a barony which conferred a seat in parliament ; and that it was of greater ancienty than the barony of Gormanston ; satisfactorily proves what the parliament of Ireland then deemed to be the effect of the writ to Walter de Birmingham, by the title of Lord of Kells. That the Lords of Gormanston could not have been Barons of Kells in Ossory by any other means than by descent, is beyond dispute. Walter de Birmingham had a grant of the manor or lordship of Kells for life only, and after his death it was granted to the Earl of Ormond ; so that it was not inherited by the descendants of the said Walter de Birmingham. At the time, therefore, when the parliament of Ireland recognized, by an express statute, that Lord Gormanston was Lord of Kells, and as Lord of Kells admitted his right of precedency over the Lords of Slane, he was not possessed of the territorial lordship of Kells, nor had he, or any other person, ever been created Baron of Kells by patent : hence the stat. 2 Edw. IV. affords evidence of the most conclusive nature, that the effect of a writ of summons as a baron to the parliament of Ireland was the same as the effect of a writ to the

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parliament of England, and created a barony to the heirs general of the body of the person so summoned.

In another point of view, the precedence allowed by the stat. 2 Edw. IV. to Lord Gormanston over Lord Slane is extremely material, if, as Mr. Fleming contends, precedence was in early times an infallible rule by which to judge of the date of the creation of a dignity. It is certain that the barony of Kells, as a parliamentary barony, was not created before the writ of summons to Walter de Birmingham, in the reign of Edward the Third; and by allowing the inheritor of that barony precedence over the Lord of Slane, it is obvious that the parliament of the 2d Edw. IV. considered that the barony of Slane was not created until after the creation of the barony of Kells. Nor is it difficult to reconcile this with the fact that a writ issued to Baldwin le Fleming in the 3d Edw. II., and that Walter de Birmingham was not summoned until the reign of King Edward the Third, because there is no evidence to shew that subsequent writs were addressed to the said Baldwin le Fleming, or that he ever sat in parliament under the only writ which is recorded to have been addressed to him. On discussing the question in the 2d Edw. IV. it is manifest, from the words of the statute, that evidence was examined on the subject, and that the House of Lords attached more importance to the sittings of the Lords of Slane and the Lords of Gormanston, than to the dates of the first writs addressed to them: in other words, it considered that the first proof of sitting in parliament was evidence of the date of the creation. The proof of sitting of a Lord of Slane was not traced farther

than to Simon le Fleming, who died in 1370. Of Baldwin le Fleming, who was summoned in the 3d Edw. II. (the father of the said Simon), no notice whatever is taken; and the only conclusion which can be drawn from the omission is, that proof of his having sat in parliament was not extant. If then the date of the creation of the barony of Slane be brought so long within the time of legal memory as the middle of the reign of King Edward the Third, the argument founded upon its being a barony by "prescription" (little as that argument, under any circumstances, is worth), must fall to the ground.

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The barony of Slane, like the barony of Kells, originated in a writ of summons to and a sitting in parliament; and whatever was the effect of such writ and sitting in the instance of the barony of Kells, the same must be held to be the effect in the case of the barony of Slane. The statute of the 2d Edw. IV. shews that the barony of Kells descended to Lord Gormanston, as heir general, through an heir female, and that the Irish parliament solemnly recognized it to be vested in Lord Gormanston. Can it then be pretended, in the absence of a patent, that the barony of Slane was of a distinct nature from the barony of Kells; and that though created about the same time, and by precisely the same means, yet that it was descendible to a distinct class of heirs?

The grounds upon which Mr. Fleming's argument rests, that the barony of Slane was confined in its descent to heirs male, may be briefly stated to be,—

I. That the ancestors of Baldwin le Fleming,

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who was summoned in the 3d Edw. II., were frequently styled "Domini de Slane," or "Barones de Slane;" that in the reign of Henry the Third, the head of the family ranked among the "magnates" of Ireland; and it seems to be insinuated that before the reign of Edward the Second, the tenure of the lordship or barony of Slane conferred the dignity of peers of Ireland upon its possessors.

Excepting with the view of shewing that the barony of Slane existed as a parliamentary dignity before any writs of summons are extant, it is difficult to comprehend in what way these statements can benefit Mr. Fleming's case. He does not found his claim on the barony of Slane being a barony by tenure, because he is not possessed of the lordship of Slane; and even if the tenants of that manor were, as he contends, "magnates" of Ireland antecedent to the reign of King Edward the First, that circumstance by no means proves that the dignity of which Mr. Fleming supposes them to have been possessed would be confined in its descent to heirs male; because all dignities, until the reign of Edward the Second, were granted to heirs general; and every precedent upon record establishes, that such dignities have uniformly descended to heirs general.

An error of a fatal nature, with respect to the deductions which are drawn from it, prevails throughout Mr. Fleming's case. It is said, that because the terms "Dominus de Slane," and "Baro de Slane," were applied to various persons, who succeeded as heirs male to the lordship of Slane, they were peers of parliament. That the words "Lord" and "Baron" were frequently used in

England, but more especially in Ireland, to designate the possessor of certain lands, called lordships or baronies, is a fact generally known ; but it has never been pretended that they were peers of the realm. In England, the owners of the manors of Burford, Skirpenbek, Hilton, Shipbroke, Kinderton, and some others, were always styled "Barons of Burford," "Barons of Skirpenbek," "Barons of Hilton," "Barons of Kinderton," and "Barons of Shipbroke ;" whilst in Ireland there have been the "Barons of Galtrim," the "Barons of Birr," the "Barons of Skrine," the "Barons of Navan," the "Barons of Castle Knocke," the "Barons of Auverke," the "Barons of Bargie," the "Barons of Burnchurch," the "Barons of Brownesford," the "Barons of Loughmoe," the "Barons of Balynoa," the "Barons of Courtown," and numerous others ; but the expression imported nothing more than that they were lords of those particular lordships, or palatine baronies. The word "Dominus" often bore the same meaning, but it was sometimes used with much greater latitude : hence no reliance whatever can be placed on those expressions, as indicating the possession of a peerage in either country.

II. Mr. Fleming's next position is, that because David Fleming, who was summoned to parliament between the 36th Hen. VI. and 3d Edw. IV., was, according to the stat. 2d Edw. IV., allowed a higher precedency than could belong to a creation in or subsequent to the reign of Henry the Sixth, it is evident that he succeeded to an ancient dignity, instead of having been created to a new barony ; and this fact, he says, is further proved, because the stat. 2d Edw. IV. shews that the said David

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could not have been created *de novo* by writ, inasmuch as he is therein stated to have absented himself from parliaments and great councils, to prevent evidence being given upon the question between him and Lord Gormanston for precedency.

Weight is attached to the circumstance of the persons who were summoned to parliament, as Barons of Slane, having a higher precedency than could belong to a creation by the first writ respectively addressed to them; but the circumstance does not justify the inference drawn from it, and precisely the same thing has often occurred in the parliaments of England, without affecting the rights of the heirs general of the original baronies.* To the objection, that David Lord Slane could not have been created by writ, because to prove such a creation a sitting must be shewn, and the statute of 2d Edw. IV. stated that "he absented himself from parliaments and great councils," it is sufficient to reply, that that statute, by accusing him of having "absented himself," proves that a writ of summons had issued to him, because such a charge could not be made, unless he had been commanded to attend; and that fact fully accounts for his being styled "Lord Slane" in the said act. Whether he did or did not sit in parliament, may be material in the event of a claim by the heir general of his body; but it has nothing whatever to do with Mr. Bryan's case: on the contrary, he contends that the said David Lord Slane had no hereditary right to be summoned; but that, if summoned, the writ created him to a new and distinct barony of Slane. It must, however, be remarked, that the words of the stat. 2d Edw. IV.

* See p. 182. *et seq.*

do not admit of the construction which Mr. Fleming has given to them; for the statement, that David Fleming "had absented himself from parliament and great councils," clearly refers to the 2d Edw. IV., the immediate period when Lord Gormanston revived the question about his precedence; but all which it is essential for Mr. Bryan to establish is, that if, as appears to be the case, the said David was summoned to parliament, he was not entitled *de jure* to the writ as heir male of the preceding Barons of Slane.

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III. Mr. Fleming insists that if the persons who were summoned to parliament as Barons of Slane, on succeeding as heirs male, "were not peers by inheritance, the immediate agency of an adequate legal and constitutional power so to ennoble them, has in no one instance been proved to have intervened in these alleged creations of peerage; and that even supposing the power of ennobling commoners without the specific sanction of the royal authority, and of creating peerages by writ of summons to the parliaments of Ireland, to have legally and constitutionally vested in the option and pleasure of the successive lords lieutenant and lords justices of Ireland, and even of their deputies, who were often themselves commoners, the proofs usually deemed necessary in England, where peerages by writ actually exist, to substantiate such creations by royal writ of summons to and sitting in parliament in virtue thereof, have not been produced by Mr. Bryan, in any one instance of these six alleged creations."

The distinction here drawn between the writ of the king to an English parliament, and the writ of

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the lords lieutenant of Ireland in the king's name to an Irish parliament, is only entitled to attention from its novelty. It is well known that the lords lieutenant, or lords deputy of Ireland, were always instructed by the crown respecting the summoning of parliaments, the creation of peers, and the appointments of the high officers of state in that kingdom; and whatever took place on either of these subjects must be considered as the act, not of the lord lieutenant, but of the king, in whose name the writs of summons and the patents of creation and appointments issued. Every creation of peerage, whether by writ or by patent, must therefore be presumed to have occurred by virtue of the necessary authority, of which the act itself is sufficient legal evidence; and it is no more necessary to produce proof of power having been expressly given to a lord lieutenant of Ireland to create a peer by writ of summons, in the fourteenth, fifteenth, sixteenth, or seventeenth century, than it is necessary to produce the writ of Privy Seal in order to establish the validity of a patent of an Irish Peerage at the present day. The patent itself is legal evidence of the creation in the one case; and the issuing of the writ, followed by a sitting in parliament, is evidence of the creation in the other. It is also to be observed, that writs of summons to the parliaments of Ireland, like writs to a parliament of England, issued in the King's name, and were nearly verbatim the same. To deny to the former the effect which the law attaches to the latter, would be inconsistent with legal principles; and be tantamount to asserting that the prerogative of the Crown in Ireland was inferior to, and distinct from, the prerogative of the Crown in England.

Mr. Fleming's assertion that the proofs "usually deemed necessary in England, where peerages by writ actually exist, to substantiate such creations by royal writ of summons to and sitting in Parliament in virtue thereof, have not been produced by Mr. Bryan, in any one instance of these six alleged creations," is met by producing the statute of the 2d Edw. IV., which proves the sitting of the two Lords Slane, namely, of Simon Fleming in the reign of Edward the Third, and of Christopher Fleming in the reign of Henry the Sixth. The fact, that no writs of summons to the Parliaments of Ireland are extant, excepting for a few years, which are not embraced by the period in question, explains why the writs to those persons cannot be produced: but is it to be inferred that they could possibly have been present as peers of parliament without having been duly summoned? or that where a sitting can be shewn long before the time when the first patent of the creation of a barony was granted, the production of a writ is necessary to prove that the barony was neither created by patent, nor by that vague and unintelligible agency upon which he relies? Whether a right to an early barony, as a barony by writ, for which sittings can be shewn, but for which no writs of summons are extant, could be established, is a question which Mr. Bryan has no interest in raising. His claim is to a barony for which proofs of the issue of writs, and of sitting, can be produced; and it would rather strengthen than weaken his case if it could be proved that there never was any parliamentary barony of Slane until the issue of the writs upon which his claim is founded.

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David Lord Slane died in the 3d Edw. IV. 1463, leaving his only son Thomas his heir, then seven years of age, who died in his minority, in the 11th Edw. IV. 1471, unmarried, when his three sisters became his co-heirs, between whom the barony of Slane, which the statute 2d Edw. IV. expressly recognized to be vested in David Fleming and "his heirs," fell into abeyance; and it still continues in that state among their descendants. On this second instance of a barony of Slane terminating in heirs general, it is important to observe that a claim as a matter of right could never be made to the dignity; and consequently that the non-claim is no proof that the right was not inherited by those co-heirs.

Sir James Fleming, next heir male of David Lord Slane (namely, son and heir of William Fleming, brother of Christopher fourth Lord Slane, who died in the 26th Hen. VI.), succeeded to the lordship of Slane. He was styled a Lord of Parliament in the 12th & 13th Edw. IV.*; but writs of summons for that period are not extant. Dying in the 7th Hen. VII. he was succeeded by his son and heir Christopher, who sat in parliament as Lord Slane in the 9th Hen. VII. and died in the 9th Hen. VIII. 1517, when he was succeeded by his son James Fleming, who sat in parliament in the reign of Henry the Eighth and in the 2d Eliz. 1560. He died in the 20th Eliz. 1578, without issue, leaving his two sisters his co-heirs, between whom the barony, created to their grandfather, fell into abeyance; and as it is still in abeyance between their heirs, no claim, as a matter of right, could ever have been made to the dignity.

* Printed Evidence, No. IV. pages 29 and 30.

Mr. Fleming observes, that James Lord Slane (the heir male of Thomas Lord Slane, who died in his minority, in December, 11 Edw. IV., 1471,) immediately after the death of the said Thomas Lord Slane, received permission to remain one year in England, for the purpose of obtaining livery of his lands there *; and that as the stat. 12 & 13 Edw. IV. cap. 5., which recognizes him as a lord of parliament, was passed before the expiration of the year, he could not have acquired the rank of a peer by a sitting in parliament under a writ of summons. Mr. Bryan repeats that it is no part of his case to shew that the said James Fleming ever was a peer; but, as Mr. Fleming infers from the recognition in the stat. 12 & 13 Edw. IV. that James Fleming was considered to have succeeded to the original dignity, and not to have been created to a new barony by writ, it is incumbent upon Mr. Bryan to prove that the deduction drawn from the circumstances alluded to is unfounded. Mr. Fleming assumes that in the reign of Edward the Fourth, a proof of sitting was necessary to entitle a person who was summoned to parliament to be styled a baron of parliament, a presumption which is wholly unsupported by facts. If a writ issued to James Fleming, commanding him to attend the parliament by which the statute in question was enacted, can any reasonable person doubt that he would be styled a baron of that parliament, even supposing that he had not sat under the writ? But it does not follow that, because James Fleming was permitted to go to England for a year, he must have continued out of Ireland during the whole of that time. The licence named

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* Printed Evidence, No. IV. pages 29 and 30.

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the longest period for which he could be absent, but it does not prohibit his return whenever he thought proper. Moreover, one year was the usual period for which licences of absence from the kingdom, letters of protection, and other special exemptions from duties, or from the operation of the law, were granted; and, as can be shewn by numerous instances, they are by no means conclusive evidence that the individuals so favoured availed themselves to the full extent of the indulgence. There is therefore nothing to justify the opinion that James Lord Slane was not summoned to and sat in the parliament of the 12 & 13 Edw. IV.

It is argued for Mr. Fleming that, although Mr. Bryan contends that James Lord Slane "was created a peer by writ of summons to and sitting in parliament in the reign of Edward the Fourth, he does not offer any proof to the House as to what parliament he was summoned, or in what parliament he sat during that reign."

To this objection the answer is conclusive. There are no writs of summons to nor any actual proof of the sitting in the parliament of Ireland of peers for the reign of Edward the Fourth, excepting the statutes which have been referred to; and even if there were, Mr. Bryan has no motive for producing them. As the statute of the 12 & 13 Edw. IV. calls James Fleming a lord of parliament, it must be presumed that he was summoned to that assembly; but if the recognition arose from hereditary right alone, it is for Mr. Fleming to produce a patent, or some other proof of the way in which that hereditary right was created. Having shewn that the original barony was not created by any instrument which limited its descent to

heirs male, Mr. Bryan of course attributes its origin to the only other mode of creation known to the law; and finding that certain persons were recognized by the Irish parliament as Barons of Slane who could not possibly have succeeded to the original barony under the operation of the law on the subject of baronies by writ, he followed the two precedents established by the English House of Lords, and presumed that each of those persons was created to a new and distinct dignity. The onus of proving the contrary rests with Mr. Fleming; and Mr. Bryan need only add, that, as he claims nothing through the James Fleming who is presumed to have been summoned to parliament in the reign of Edward the Fourth, he has no other interest in the question, whether he was or was not a peer, than to convince the House that if he were a baron of parliament he could not have become so by hereditary right.

Soon after the barony of Slane, which was created to the said James Lord Slane, fell into abeyance in the year 1577, the Crown was pleased to summon Thomas Fleming, of Stephenstown, the heir male of the last baron, to parliament, who succeeded to the lordship of Slane, under the entail; but the earliest proof of his having been so summoned is a document called a parliamentary pawn*, of the 27 Eliz. 1585.

* "The parliamentary pawns are sometimes copies, sometimes abstracts, of the writs and precepts that issue for summoning the peers to parliament (similar to the entries on the Close Rolls), with schedules, containing the names and titles at length of the several persons to whom such or similar writs were sent. When the parliament meets, the parliamentary pawn is completed; and after that period all

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Thomas Lord Fleming died in November 1597, leaving two daughters his co-heirs; namely, Eleanor, who married her cousin William Fleming, of Derpatrick, who, as heir male of the Fleming family, succeeded to the manor of Slane; and Catherine the wife of Pierce Butler, of Old Abbey in Kilkenny; between which co-heirs the barony created to their father fell into abeyance, and remains vested in their descendants.

Mr. Fleming contends that the above-mentioned William Fleming (husband of Eleanor, the daughter and co-heir of the last Baron Slane) succeeded to the dignity as heir male; and adduces in proof of his being a peer of the realm,—

I. The inquisition on the death of Thomas Lord Slane in 1597, in which the said William Fleming is called “William now Lord Baron of Slane.”

II. His being described as the king’s “very noble subject William Fleming, Lord Baron of “Slane,” in the grant of the livery of his lands by King James the First.

III. His answer to a bill in Chancery, which he was permitted to make “upon honour,” and in which he is styled by that title.

“writs of summons are issued from the Crown-Office in Chancery.

“It became the practice, about the time of Henry the Eighth, when a parliament was to be called, for the Clerks of the Petty Bag-Office in Chancery, in pursuance of a warrant from the Lord Chancellor, to prepare these abstracts and schedules, with the help of the Masters in Chancery and the Heralds; and being fairly engrossed on parchment, they were lodged in the Petty Bag-Office, under the name of “Parliament Pawns.”—Grimaldi’s “Origines Genealogicæ,” p. 201.; from the Reports on Public Records; and the Minutes of Evidence on the Howard de Walden Peerage.

To these facts Mr. Bryan replies:—

First.—That a man being described by a title of peerage in documents issued by the Crown, or his being so considered by a jury and in proceedings in Chancery, are not evidence of his legal right to the dignity so ascribed to him. There are many precedents of titles being attributed to persons not merely by themselves, but in the most solemn instruments from the Crown, to which they had no just right or pretensions.* Great laxity prevailed on this subject long after the reign of James the First; and if the heirs of individuals, to whom titles of dignities have been improperly applied by the Crown, are therefore to be considered

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* Of the numerous examples that might be adduced in which the Crown attributed dignities improperly to individuals, a few only will be mentioned. In the 15th Hen. VIII. Sir Arthur Plantagenet was created Viscount L'Isle; and in the patent it is said that Sir Charles Brandon had in the 5th Hen. VIII. been created Viscount L'Isle, to him and his heirs male of the body of Elizabeth Grey, "*ad tunc Vicecomitisse Lysle*," whom he intended to marry. That lady had not, however, the slightest pretensions to the title, the dignity of Viscount L'Isle having been limited to the heirs male of the body of Sir Edward Grey, her grandfather.

Edward Somerset, son and heir apparent of Henry first Marquis of Worcester, is repeatedly styled Earl of Glamorgan and Baron Beaufort of Caldecote Castle, in commissions and other instruments by Charles the First; in one of which he is addressed as "Lord Herbert, Baron Beaufort of Caldecote, Grismond, Chepstow, Ragland and Gower, Earl of Glamorgan," but there are strong reasons for believing that he was never legally created to either of those dignities.

In the year 1784 George Townshend, Baron Ferrars of Chartley and Baron Compton, was created Earl of Leicester by a patent, in which he is styled "Baron de Ferrars of Chartley, "Baron Bouchier, Lovaine, Bassett, and Compton;" but he was only a co-heir of the barony of Bouchier: there never was a parliamentary barony of Lovaine, and the barony of Bassett was then vested in other families.

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entitled to those dignities, a new principle respecting honours must be introduced. The circumstance of a title being attributed to a person in an *inquisitio post mortem* is deserving of very little weight.* It formed no part of the duty of the jury to inquire to whom the dignity belonged, but to ascertain who was the next heir to certain lands; hence any description of the heir beyond what was sufficient to identify him as the next heir of entail, was foreign to their inquiry, and cannot be considered evidence of a fact which it was not their province to investigate. Recent instances of the finding of juries on the subject of titles of honour in Scotland, shew that it would be dangerous to attach much importance to such returns; and it is not likely that a jury in a country town in Ireland, in the reign of King James the First, were more careful in the investigation of evidence on a point which was not necessarily brought before them. Upon proceedings in Chancery it is unnecessary to make any particular observation, because it must be evident that the assumption or admission of a title of peerage in a bill in Chancery is no proof of the right of the party to whom it is attributed.

As to the statement that William Fleming was styled "Lord of Slane," the circumstance may have arisen from his having possessed the lordship of Slane; or it is not impossible, though no record is extant to prove it, that he was summoned to

* Many errors committed by juries on the subject of dignities might be stated. In an inquisition taken in the 2d & 3d Phil. & Mary, on the demise of Thomas Lord Berkeley, he is styled "Dominus de Berkeley, Mowbray et Segrave, though he was only a co-heir of the baronies of Mowbray and Segrave; and in 1639 the abeyance of the barony of Mowbray was determined in favour of Henry Howard, the descendant of the other co-heir.

parliament either in a new barony, or in the barony created to Thomas the preceding Lord Slane, whose daughter and co-heir he had married, the abeyance being terminated in her favour, and he having been summoned in her right. Be this as it may, it is certain that there is no legal evidence of William Fleming having ever been summoned to or sat in parliament; and to whatever credit the records cited in Mr. Fleming's case may be thought entitled, as proof that William Fleming was a peer, they do not establish that he succeeded to the dignity by hereditary right as heir male.

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William Fleming died in 1612, leaving a son, Christopher Fleming, of full age. He was summoned to and sat in parliament as early as May 1613; and it is under the writs to and sitting in parliament of the said Christopher Fleming, and of his son William Fleming *, that Mr. Bryan claims the barony of Slane, he being heir general of the bodies of the said Christopher and William Lords Slane.

Mr. Fleming contends that the said Christopher Fleming was neither created to a new barony nor summoned in right of his mother, the co-heir of Thomas Lord Slane, who died in 1597; but succeeded as heir male of all the former barons, and inherited the original barony of Slane. That this was not the fact, and that a discussion took place with respect to the dignity of which the said Christopher Fleming was possessed, is placed beyond dispute by some contemporary papers in the British Museum. It appears that in 1614 a dispute arose between this Lord Slane and the Lord

* Printed Evidence, No. I. pp. 5. 8. to 12.; No. II. pp. 1, 2, 3.; and No. I. pp. 20, 21, 22.

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of Kerry for precedency, which caused the origin of the barony of Slane to be investigated; and an opinion is extant, stating that the barony of Slane is a barony by writ, and that "Thomas Fleming hath no issue male, but had two daughters; Eleanor, married to William Fleming, this baron's father, by which he claimeth; Katherine, married to Pierce Butler, by whom she hath issue living; so as by these two several co-heirs the dignity (if any had been) of the Baron of Slane is wholly, by all law and custom, extinct."*

The opinion there given, that when a barony by writ fell into abeyance it became extinct, has long since been exploded; but it was commonly entertained in the reign of James the First, and the point does not appear to have been finally settled until the case of the barony of Willoughby de Broke, in the year 1694.† The above passage is only cited to shew that the original barony of Slane was deemed a barony by writ; and that the hereditary pretensions of Christopher Lord Slane to a barony of Slane, were derived through his mother. If the doubt which was expressed in Camden's opinion, as to the validity of his pretensions, was held to be well founded, Christopher Fleming must have been created to a new barony, instead of having obtained a termination of the abeyance of the dignity created in the reign of Elizabeth to his maternal ancestor, Thomas Fleming. It is confidently assumed by Mr. Fleming that the abeyance of that barony was not determined in favour of Christopher Fleming, because Eleanor

* Cotton. MS. Titus C. x. fo. 64. b.

† Cruise on Dignities, p. 197—206.

his mother was living at the time when he was summoned to parliament; but that an abeyance was formerly considered to be determined by summoning the heir apparent of a co-heir, instead of the co-heir himself, is proved by the case of the barony of Mowbray, in April, 1639.* The point is, however, not very material to Mr. Bryan, whether the abeyance of the dignity of which Thomas Lord Slane died seised in 1597 was or was not determined, because he relies on the writs to and sitting of Christopher Fleming, and of his son William Fleming, Barons of Slane, as having created a barony of Slane to the said Christopher, and the heirs of his body, supposing that he did not succeed *jure matris* to the previous barony: but it was essential that documents should be referred to in proof that in the reign of James the First the barony of Slane was considered a barony by writ.

Christopher Lord Slane died in 1625, leaving several sons, of which Thomas was the eldest, and William the second son.

Thomas Fleming, the eldest son, being a pro-

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* Roger de Mowbray was summoned to parliament in the 23d Edw. I., and the barony created by that writ descended to his heir, John Mowbray Duke of Norfolk, who died in 1475, leaving Ann his daughter and heiress, who died without issue, when the barony of Mowbray fell into abeyance between John Howard Duke of Norfolk, and William Marquis of Berkeley, the heirs of Margaret and Isabel, daughters of Thomas first Duke of Norfolk and sixth Baron Mowbray. It continued in abeyance between the heirs of those personages until April, 1639, when Henry Howard (son and heir apparent of Thomas Earl of Arundel, Norfolk, and Surrey, who was then the elder of the co-heirs,) was summoned as Baron Mowbray, and took his seat in the precedency of the ancient barony.

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fessed friar beyond the seas, the manor of Slane was settled by his father, with the rest of the property of the family, on his second son, William Fleming.

On the 6th October, 5 Car. 1. 1629, the King addressed a letter to the Chancellor and Justices of Ireland, stating that Christopher late Baron of Slane had estated his whole barony and lands upon William Fleming his second son, and the heirs male of his body, in consequence of Thomas his eldest son having become, and being then, a professed friar beyond the seas, who had relinquished all his interest in the said barony and lands, and in the dignity of Baron of Slane, to the said William, his brother, and his heirs; and that it was his Majesty pleasure that a patent should issue, granting to the said William Fleming, and the heirs males of his body, as an especial mark of favour, the same precedency of place, title, honour, state, and dignity, “ of Baron of Slane, in as ample
“ a manner, and with all and every rights, privileges, pre-eminences, prerogatives, immunities, and allowances belonging thereunto, as his
“ father, or any other of his ancestors, Barons of Slane, have ever held and enjoyed: Always
“ provided, that if at any time Thomas Fleming
“ shall return to his country, and, quitting the
“ habit of life he is entered into, shall claim as well
“ the estate as the honour, which decends unto
“ him by birth, the said William Fleming his
“ brother shall resign, together with the inheritance fallen unto him by this means, the honour
“ which hereby we will and command to be conferred upon him.” *

By this letter the King recognised the old dignity as inalienable in Thomas Fleming, but directed a new title by patent to be created to William, with the precedency of the barony, which was enjoyed by his father.

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These instructions, however, appear never to have been forwarded *, and were certainly not acted upon; and on the 30th of the same month a second letter was addressed to the Chancellor and Justices of Ireland, containing in effect the same recital respecting Thomas Fleming the friar, though in different terms; but it is added, that he had humbly desired that the King would be graciously pleased to “give way that, during his life, “his said brother William and the heirs male of “his body might be reputed Barons of Slane;” and his Majesty declared “it to be his royal will “and pleasure that the said William, and the heirs “male of his body, shall be from henceforth, “during the life of his said elder brother, reputed, “styled, and called Barons of Slane; and further, “our pleasure is, that special care be had that in “all meetings, assemblies of parliament, or other- “wise, where the said William Fleming shall “happen to be, or the heirs male of his body, in “case he die in the lifetime of his eldest brother, “that he or they shall have the same places and “precedency which of right belonged unto his “father. But with this caution, that if the said “Thomas Fleming shall hereafter, quitting the “habit and life which he is now entered into, re- “turn into his country, claiming the said title of

* The originall etter of the 6th October, 1629, is still in the State Paper Office in England.

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 “that this declaration of our gracious pleasure
 “towards his said brother shall be noways prejudi-
 “cial unto him.”

Upon the first of these letters it must be remarked, that a strong doubt may be entertained of the legality of so much of it as provided that the dignity conferred upon William Fleming should be resigned in case his elder brother Thomas returned to Ireland and abandoned his profession of a friar, because it is now held that no peer can resign his honours; and this may have been one reason why that letter was never forwarded. In the second letter, dated three weeks after the former, it is simply provided that if Thomas Fleming returned, quitted his habit of life, and claimed his estates and the title of Lord Slane, that then the grant to William “should not be prejudicial to him.” This distinction between the two letters is very important, as is also the fact that the first letter directed the Chancellor and Justices to create William Fleming a Baron by patent, whereas the second letter is a mere declaration of the royal will, and was clearly intended to authorize the Chancellor and Justices to issue a writ to the said William Fleming, and to give him the precedence which his father enjoyed. The second letter admits also of other inferences, which are extremely material to Mr. Bryan’s case. It proves that no patent ever issued to William Fleming; and the mere declaration of the royal will, that a dignity should be allowed to a particular person, with a certain limitation, cannot be held to have legally created that dignity. Such a document could merely have the effect of a royal war-

rant, and it has been often decided that unless the royal warrant be followed by a patent no dignity is created. It is therefore contended that the letter had not the effect which was intended, and must be treated as if it had never existed, so far as regards the dignity in question ; but it is evidence that no patent ever issued to William Fleming. Another inference to be drawn from that letter (and which is corroborated by various other facts, some of which are stated in this case) is, that the Crown then assumed the right of granting any precedence it thought proper ; whilst, by fixing the place of the new baron to that which of right belonged to his father, instead of assigning to him, as the previous letter had done, the place “ which any other of his ancestors, Barons of Slane, had enjoyed,” it would appear that the Crown became sensible of having committed an error on the subject, and had discovered between the dates of the two letters that Christopher Lord Slane had been created to a new barony.

The difference between stipulating that William Fleming should resign the honour in case his elder brother claimed and became eligible to enjoy it, in the letter of the 6th October, and providing, in the letter of the 30th October, that in such a contingency the grant to William Fleming should not be prejudicial to Thomas Fleming, seems to be this,—that the said Thomas Fleming should succeed to the barony which was vested in his father, with the precedence thereto belonging; and that William should retain the dignity then conferred upon him as a new grant, with the precedence of that grant.

The “ King’s letter,” or royal warrant of the 30th October, 1629, was enrolled in the Chancery

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of Ireland on the 6th November following; but no proceedings were adopted in consequence, and the letter did not, and could not, create a peerage. On Monday, the 14th July, 10th Car. 1., 1684, it appears from the Lords' Journals of Ireland that William Lord Slane's counsel "moved for the
 "issuing of a writ of summons to him as son and
 "heir unto Christopher late Lord of Slane, and
 "that his lordship might take his place in this
 "high and honourable assembly of parliament as
 "his said father and his ancestors, Lords of Slane,
 "have heretofore done. Upon consideration where-
 "of it is thought fit, and accordingly ordered by the
 "lord deputy, that the said writ shall be granted
 "unto him, and that the said William shall take
 "his place and have precedence as Lord of Slane.
 "But forasmuch as it appeared that the said
 "William had an elder brother named Thomas,
 "who, in the lifetime of his father, about fourteen
 "years since (as was alleged), went into parts be-
 "yond the seas, from whence he is not yet re-
 "turned; and it appears not that he is living, but
 "is rather presumed to be dead: It is therefore
 "ordered, that the awarding of the said writ, and
 "the placing of the said lord in the room of his
 "father, shall be with a *salvo jure* of the said
 "Thomas, in case the said Thomas be living and
 "return; and with this further saving, that in
 "case the said Thomas be living, and that he or
 "his heirs shall, at any time hereafter, return into
 "this kingdom and reassume the title of Lord
 "of Slane, that then and in such case the said
 "William or his heirs shall take no advantage or
 "benefit by the said writ, or any consequent
 "thereof, but shall be altogether secluded from

"any such title, place, or privilege as he may claim by pretext of that writ, as if the honour and favour now granted unto him had not been, or that no such writ had ever been awarded to him: under which conditions and salvos the said William did accept of the said favour, and fully consented it might be entered accordingly." *

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On the next day, July 15th, 1634, the following entry occurs on the Journals: —

"Memorandum — That according to an order of the Right Honourable the Lord Deputy, made in full Parliament on Monday last, the fourteenth day of this instant month, his Majesty's writ of summons was delivered to the Right Honourable William Lord Baron of Slane, who was this day brought into this House by the Lords of Howth and Dunsany, and the said writ allowed: himself placed between the Lord of Kerry and the Lord of Howth." †

This proceeding in the House of Lords of Ireland establishes that the King's letter of the 30th October, 1629, had no agency whatever in causing a writ of summons to issue to William Fleming. It was never once adverted to in the House, much less was it made the ground for summoning him; but, on the contrary, he is expressly said to have claimed as son and heir of his father. The *salvo jure* in the entry on the Lords' Journals merits attention from its being in favour of "the heirs" of Thomas, instead of the heirs male of his body; because it tends to prove that the hereditary dignity to which he was entitled by birth was inheritable

* Lords' Journals of Ireland, Printed Evidence, No. I. pp. 20, 21.

† Idem. *ibid.*

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by heirs general; and this is further corroborated by the proviso, that in the event of Thomas's succession, neither William nor his heirs should derive any advantage from the grant.

The entry on the Lords' Journals in 1684 is also peculiarly important on other grounds. It expressly states that a writ of summons to parliament was attended by a specific effect, which effect, it is evident from the context, was the creation of a barony; thus negating Mr. Fleming's assumption that a writ to and sitting in an Irish parliament, did not operate as a writ to and sitting in an English parliament.

The Lords expressly provide in their resolution, that in a particular contingency "the said William, "or his heirs, shall take no advantage or benefit by "the said writ or any consequent thereof, but shall "be altogether secluded from any such title, place, "or privilege, as he may claim by pretext of that "writ, as if the honour and favour now granted to "him had not been, or that no such writ had ever "been awarded to him."

If this expression does not mean that a writ of summons and "a consequent thereof," namely, the sitting, created a barony to the individual and his "heirs," it is impossible to attach to it any import whatever. Whether such a *salvo jure* would now be held to be legal, is immaterial to the argument; but it is certain that the House of Lords of Ireland imagined that it could so protect the rights of Thomas Fleming, and his heirs, from the effect of that which Mr. Fleming says was attended by no effect whatever, namely, summoning a person to parliament, and the "consequent thereof." It would be difficult to find in parliamentary records

an admission of the effect of a writ to parliament more free from obscurity, more explicit, or more decisive than this; and when it is remembered that the same principle had been repeatedly recognized and admitted in England, it must be deemed perfectly conclusive that the law of Ireland respecting dignities, like the law upon all other subjects, was, and had always been, precisely the same as the law of England.

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To strengthen still more the proposition that a writ of summons to and sitting in the parliament of Ireland had the effect of creating a barony to the heirs of the body of the person so summoned and sitting, appears by a "King's letter" from King James the First to the Lord Deputy of Ireland, dated 31st March, 11 Jac. I. 1613. His Majesty states, that "being now purposed shortly
 "to hold our parliament there, we think it fit
 "to make choice of some few eminent persons,
 "capable of that honour and trust, for the nobility
 "of their birth, their estates, and possessions in
 "that kingdom, to be assistant in the upper house
 "with the rest of the lords, and to have place
 "and voice amongst them as peers and barons of
 "that realm; wherefore we are pleased by these
 "our letters to authorize you, upon the summons
 "of our next parliament there, to call by our writ,
 "in the accustomed form, our right trusty and
 "right well-beloved cousin the Earl of Aber-
 "corn, the Lord Henry Bryan, eldest son to the
 "Earl of Thomond, the Lord Audley, Lord Ochil-
 "tree, and the Lord Burleigh, to give their attend-
 "ance in the upper house of our next parliament,
 "and to admit them to have place and voice
 "amongst the lords there as peers and barons of

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“that kingdom. Wherein, notwithstanding, we
“do not lay our commandment so strict and
“binding, either upon you or them, but that you
“may forbear to send forth our writs to call all or
“any of them to attend this service, if they shall
“desire to be forborne therein.” *

* The Earl of Abercorn and the Lords Ochiltree and Burleigh were Scotch peers, possessing lands in Ireland, and Lord Audley was a peer of England. There is no evidence that any of these peers attended parliament, except the Lord Henry Bryen, whose name occurs to the complaint of the Lords to the Lord Deputy, respecting the invasion of their privileges by the Commons in 1614. The letter is as follows:—

Copy of a Writ of Privy Seal, or King's Letter, remaining of Record amongst the Rolls, in the Rolls' Office in His Majesty's High Court of Chancery in Ireland, Dated the 11th of March, 11 James I.

JAMES REX.

By the Kinge.

Right trusty and welbeloved, wee greet you well; wee received lately your L^{res} dated the foure and twentieth of Februarie last past, wherein you p^ound divers considerable matters touchinge our service there, and desire to understand our pleasure concerning them, to most p^t of w^{ch} you shall receive our answer by our Counsell, to whome wee have fully impted our mynde therein, and for the rest, w^{ch} are of a higher nature, and soe require our spⁱall and im^mediate warrant, to direct and authorise your p^oceedings in them, wee doe nowe by these our L^{res} signifie our exp^ose pleasure concerninge the same. As of late it seemed fitt unto us to erect divers townes into boroughes, scituate in the remote p^ts of that our kingdom of Ireland, and to give them priviledge to send Burgesses to our high Court of Parliament, w^{ch} heretofore they did not, to th' end that by this indifferent course and distribu^on our subjects in geⁿall may be equallie interested in the makinge those lawes under w^{ch} they must live, and that by their access^on the lower house of our Co^mmons may be the better strengthened with advise and counsell, to deliberate upon those weightie affaires w^{ch} shall fall in consulta^on amongst them, soe likewise beinge now purposed shortly to hold our Parliam^t, then wee thinke it fitt to make choise of some fewe eminent p^osons capable of that honor and trust, for the nobility of their

There is in this document a clear recognition of the power of a writ of summons to create a peerage

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berth, their estates, and possessions, in that Kingdome, to be assistant in the upper howse with the rest of the Lords, and to have place and voice amongst them as Peers and Barons of that Realme; wherefore wee are pleased by these our L^{tes} to authorize you, uppon the soffions of our next P^{li}ament there to call by our writt, in the accustomed forme, our right trustie and right welbeloved cossen the Erle of Abercorne, the Lord Henry Brian, eldest sonne to the Erle of Thomond, the Lord Awdly, Lord Ochilltree, and the Lord Burleigh, to give their attendance in the upp howse of our next P^{li}ament and to admitt them to have place and voice amongst the Lords there as peers and Barons of that Kingdome; wherein, notwithstanding, wee doe not lay our comandment soe strict and bindinge, either uppon you or them, but that you may forbear to send forth our writts to call all or any of them to attend this service, if they shall desire to be forborne therein, the importance of their own private occasions beinge best knowne unto themselves, w^{ch} may necessarilie inforce them to be absent from it. Wee understand that there may arise some question att our next P^{li}ament, whether the Lord Barry Viscount Buttevant, and the Lord Bourke, of Castle Connell, ought to have voice and place in this uppr house as Lord of that Kingdome, in regard that it is alleged that the Lord Barry hath an elder brother yet livinge, to whome in right of his birth the honor of the house belongs, and that their is a suite yet dependinge, touchinge the right of the Barony of Castleconnell, betwixt the Lord Bourke and his elder brother's sonne, whose challengeth the inheritance of that honor by right of descent, according to the lawes of our Realme; for as much as these questions may turne to the disturbance of those affaires w^{ch} are to be handled in P^{li}am^t, wee thinke itt fitt, for p^{ro}vision of those inconveniences nowe before hand, and p^{ro}visionallie, to declare our pleasure concerning them; in regard that the Lord Barry hath beene alwaies honorable reported of for his dutifull behaviour to our state and hath enjoyed, without contradi^{ct}ion, these many yeares the title and honour and livinge of his house, and that his brother, whose is said to be elder is both domme and deafe, and was never yet in possession of the honor or livinge of his house, Wee are pleased to comand you, yf this question concerninge the Lord Barrie's right to sitt in Parliament be stirred by any person, that you silence it by our comandm^t, and that you doe admitt him according to his degree,

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of Ireland. Its purport was to instruct the Lord Deputy to raise certain persons to that rank, and

to have place and voice in pliam^t, not takeing knowledge of any doubt which may be moved of his legall right thereunto. Touchinge the Lord Bourke's, though wee allow him to be in possession of the Barony, in regard of his dutiful affections to our State, and are verie willinge to doe him favour, yet because wee cannot in justice admitt him to the place of a Baron of our P^lliament, without a manifest p^judice to the right of his brother's sonne, who is under age, and pursues at this tyme by the indeavour of his friends to recover the Barony by the course of law, wee thinke it fitt, till this question be legallie determined, that you do forbear to call him by our writt to give his attendance in P^lliament, not purposing hereby to discountenance any waies his right, but because wee would have itt free to the discussion of the lawe, which must decide it; Wee have sent by Bradly our comission unto you, givinge you power to determine all such controversies which may arise betweene any of the Lords, touchinge their place and p^{re}cedence in P^lliament, whereby you may see howe carefull wee are to remove away all matter of contention w^{ch} may give you any interruption to the handlinge of those weightie affaires w^{ch} shall fall in consulta^on then; and herein wee doe lett you knowe that wee doe soe much relye upon your judgment and care in guidinge occasions and governinge those busynesses w^{ch} shall happen to be treated of in P^lliament, that wee are very confident the successes from thence wilbe nothinge inferior to our expecta^on of them, and theis our L^res shall bee your sufficient warrant and discharge in this behalfe. Given under our signett, at our pallace of (Westmⁿ), the last day of March, in the eleventh yeare of our raigne of England, Ffrance, and Ireland, and of Scotland the six-and-fortieth.

Our pleasure is that the Erle of Abercorne shall hold the same place and p^{re}cedence of an Erle in P^lliament as he doth at our counsell table, and in all other places.

To our right trusty and welbeloved the Lord Chichester, our Deputye of our realme of Ireland.

M^d q^d vicesimo quarto die Maii anno dⁿⁱ 1613, Johes Hamilton gen^l venit in Canc^l dⁿⁱ Regis regni sui Hib^{ie} et petit ut L^re px supscrip Irrot^larent^r; ad cujus requisit^on^r Irrot^lantur de verbo in verbū put superius.

J. WOGAN, D^r K^r of the Rolls.

the mode of effecting that object is expressly stated to be, by "calling them by writ in the accustomed form." Can it then be pretended in the face of this letter, and of the entry of the Lords' Journals of Ireland in 1634, that a difference existed in the laws of the two countries respecting baronies by writ? If no such principle was known in Ireland as that peerages could be created by writ, is it likely that King James the First would have specifically ordered divers persons to be elevated by that mode of creation, instead of by patent; or, that the House of Lords a few years afterwards would have specially provided against what it evidently knew was the usual consequence of a person being summoned to and sitting in parliament? Even if no other proof of the similarity of the law on the subject of baronies by writ in Ireland and England could be found, Mr. Bryan confidently submits that the records in question distinctly and unequivocally establish the identity of that law, at the precise period when the creation of the dignity took place of which he is the claimant; and he again adverts to the stat. of the 2d Edw. IV. as containing a recognition of the existence of the same principle of law nearly two centuries before.

The King concluded the letter of the 31st March, 1613, with the following remarkable passage:—"Our pleasure is, that the Earl of Abercorn shall hold the same place and precedence of an earl in parliament as he doth at our council table, and in all other places;" which clearly demonstrates that the King exercised the power of giving any precedence he pleased; for he directed the

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Case of the
barony of Le
Poer, in 1767.

earl to be summoned as a baron, yet placed him over all viscounts and barons in parliament.

It is highly important to notice the resolution of the House of Lords of Ireland on the claim to the barony of Le Poer, in November, 1767; because the proceedings in that case were strictly analogous to those of the House of Lords of England on claims to baronies by writ, and, corroborative of the principle contended for by Mr. Bryan, that all baronies of Ireland, for which a patent cannot be produced, must be held to have been created by writ, and descend to the heirs general of the body of the person who is first recorded to have been summoned to parliament.

The family of Le Poer were of great antiquity, and possessed considerable influence in Ireland from a very early period; and they are presumed to have always ranked among the peers of that kingdom. But the first writ of summons on record to a Lord le Poer is to John le Poer, who was summoned to a parliament at Kilkenny, in the 3d Edw. II. on the same occasion as Baldwin le Flemmyng.* Nicholas le Poer was summoned to a parliament at Dublin in the 48th Edw. III.†; and was again summoned in the 1st and 4th Ric. II.‡ The heirs male of his body, who were likewise his heirs general, inherited the barony, and the dignity was vested in his descendant John Earl of Tyrone at his death in August 1704. § His lordship's only

* Close Roll in the Chief Remembrancer's Office, Dublin, 3 & 4 Edw. II.

† Chancery Roll, Dublin, 48 Edw. III.

‡ Chancery Roll, Dublin, eod. ann. vol. iv. p. 418.

§ It is said that a copy of a patent creating the barony of Le Poer to the heirs male of the grantee's body is in existence. But even if the original patent, or an enrolment of it, could be

child, Katherine, married Sir Marcus Beresford, who was created Baron Beresford, and afterwards Viscount and Earl of Tyrone. In November, 1767, the said Katherine, then Countess-Dowager of Tyrone, "claimed the barony of Le Poer in fee " by descent from her grandfather Richard, who " sat and voted in parliament, as Baron le Poer, " until the 25th Car. II., when he was advanced to " the title and dignity of Earl of Tyrone." * Her petition was referred to the House of Lords of Ireland, and was by it referred to a committee of privileges, when counsel were heard on the part of the claimant, and the Attorney and Solicitor-General appeared on behalf of the Crown. † On the 16th of November, 1767, the committee

" Resolved, that the Right Honourable the Countess Dowager of Tyrone hath fully proved her " claim to the barony of La Poer in fee, and hath " a right to the said barony in fee." ‡

The House confirmed this report; and ordered, " That the Speaker do attend the Lord Lieutenant " with the resolution whereby the Right Honourable Katherine Countess Dowager of Tyrone " hath proved her title to the barony of La Poer " in fee." § His Majesty was pleased to confirm the resolution of the House of Lords, and " to " order that the said Countess-Dowager of Tyrone " and her heirs be allowed to enjoy all the rights

found, it does not at all alter the case with respect to the principle which the resolution of the House of Ireland in 1767 confirms; namely, that where no patent can be produced, the barony must be presumed to have been created by writ, and to descend to heirs general.

* Journals of the House of Lords of Ireland, vol. iv. p. 418.

† Ibid.

‡ Ibid. vol. iv. p. 420. § Ibid. p. 421.

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“and privileges belonging to the said barony of
“Le Poer.” *

This is an express judgment of the House of Lords of Ireland, that one of the most ancient baronies of that kingdom was a barony in fee tail ; and that a writ to and sitting in parliament created a barony to heirs general ; and Mr. Bryan may safely found his claim upon this precedent, supported as it is by the opinions of numerous and distinguished Irish lawyers, who have advised upon his case and upon other cases. In no one instance do they entertain a doubt that, in the absence of a patent, the effect of a writ to and sitting in the parliament of Ireland is to create a barony to heirs general ; nor has one of them even suggested that there ever was a difference between the descent of honours in Ireland and in England. Mr. Fleming's theory, that the ancient baronies of Ireland were inheritable by heirs male only, appears therefore to have been unknown to the law advisers of the Crown in Ireland, and to the House of Lords of that kingdom in the Le Poer case in 1767 ; or to the law officers in the Athenry case in 1800 ; or in the Delvin case in the same year, and again in 1814 ; or in the Killeen case in 1813 ; on each of which occasions the Solicitor and Attorney-General of Ireland reported that those dignities were ancient baronies in fee tail. To controvert that decision, and those opinions, Mr. Fleming has not adduced the slightest evidence, much less a precedent ; and to the fact that, in a few cases, the heir male has been summoned when the dignity fell into abeyance, Mr. Bryan has already replied. Nor has Mr. Fleming cited one

* Journal of the House of Lords of Ireland, vol. iv. p. 441.

instance in which the law officers, or House of Lords of Ireland, have denied the right of heirs general of baronies by writ, or in which they have, in the remotest degree, sanctioned the doctrine that writs to and sittings in the parliaments of Ireland had not precisely the same legal effect as in England.

William Lord Slane repeatedly sat in parliament under the writ of 1634, and may be considered to have succeeded to his father's barony. If, however, it be denied that he sat in his father's barony in consequence of the existence of his elder brother, he must be deemed to have been created by those writs and sitting to a new dignity; and as Mr. Bryan is the heir of his body, it is immaterial to him what may be the resolution of the House on the point. He submits, however, that William Lord Slane did sit in his father's barony; and that, upon numerous precedents, he may adduce the proofs of the said William Lord Slane having sat in parliament, in support of his claim to the barony created or allowed to his father Christopher Lord Slane. William Lord Slane continued in possession of the dignity until his death in 1641, when it devolved on his eldest son Charles Fleming, who dying without issue was succeeded by his brother Randall Lord Slane, of whose body Mr. Bryan has proved himself the sole heir.

Mr. Fleming is not descended from the individual whom he represents as his ancestor, and he is not the heir male of the Barons of Slane.

There are many precedents* shewing the course

* Besides those which are cited (*post*), the papers printed for Mr. Bryan refer to the baronies of Burgherst, Dacre, Latimer, Abergavenny, Paget, and Roos. See Dugdale, Collins, Dodderidge, Lords' Journals, &c.

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which the House has adopted in cases precisely similar to the present, viz. where an heir male has been summoned to parliament by the name of a barony which was vested in heirs general, and allowed the precedence of the original dignity.

Barony of
Strange.

The barony of Strange was created by writ in the 28th Edw. I., and was vested in Ferdinand Stanley, Earl of Derby, at his death in 1594, he being the heir general of the body of John le Strange, the first Baron. The Earl of Derby left three daughters his co-heirs, between whom the dignity fell into abeyance, in which state it has ever since remained. The earldom of Derby devolved on William Stanley, the brother and heir male of the last Earl; and in the 3d Car. I. 1628, James Stanley, his son and heir apparent, was summoned to parliament as "Baron Strange," and took his seat in the precedence of the ancient barony, notwithstanding that the Countess of Castlehaven, eldest daughter of the said Ferdinand Earl of Derby, claimed the barony, and that the House ordered that the writ to James Stanley "should not be any way prejudicial to the said Countess, or any of the daughters of the said late Earl."* In 1736, James Murray Duke of Atholl, as heir general of the said James Stanley Lord Strange, claimed the barony of Strange, which was created by the writ and sitting of James Stanley in the 3d Car. I., which claim was allowed; and the dignity is now vested in the Duke of Atholl.†

Barony of
Clifford.

The other instance of a similar decision is in the case of the barony of Clifford. That barony was

* Lords' Journals, 7th June, 1628.

† Cruise on Dignities, p. 225 to 233. and Lords' Journals, vol. xxv. p. 11.

created by writ of summons in the 28th Edw. I., and became vested in George Clifford Earl of Cumberland, the heir male and heir general of the first Baron. He died in 1605, leaving Anne his daughter and heiress ; but in 1628, Henry Clifford, son and heir apparent of Francis Earl of Cumberland (brother of George Earl of Cumberland and Baron Clifford, who died in 1605), was summoned to parliament as Baron Clifford in the 3d Car. I. 1628, and sat in the precedency of the ancient barony. In 1691, the Earl of Thanet claimed, and was allowed, the original barony of Clifford, created by writ in the 28th Edw. I., as heir general of Anne, daughter and heiress of George Earl of Cumberland above mentioned ; and in 1737, Richard Earl of Burlington claimed the barony created by the writ of summons in the 3d Car. I. 1628, to Henry Clifford, as the heir general of that person, on the grounds that Francis Clifford Earl of Cumberland, the father of the said Henry, was not seised of any barony, and that the writ and sitting of the son created a new dignity. The House of Lords resolved that the petitioner was entitled to the barony of Clifford created by the said writ*, and which is now vested in the Duke of Devonshire.

It has been justly observed, that “ there can “ scarce be a doubt but that the Crown, in the two “ preceding cases, issued writs of summons to the “ eldest sons of the Earls of Derby and Cumberland, “ upon the idea that the old baronies of Strange “ and Clifford were then vested in their respective

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* Cruise on Dignities, pp. 233, 234.; Lords' Journals, vol. xxv. pp. 112. 130.

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“ fathers ; but this proving to have been a mistake,
“ the House of Lords conceived themselves obliged
“ to admit that the writs operated as new creations
“ of baronies, and resolved accordingly.”*

An abstract of the arguments used in the claim to the barony of Strange, in 1736 (the success of which appears to have produced the claim to that of Clifford in the following year), will be found in Mr. Cruise’s work “ On Dignities,” whence it is manifest that the principle which was recognized and admitted by the House upon those occasions is precisely that upon which Mr. Bryan rests his case; namely, “ that where there is no creation by “ letters patent, if issue be joined in any question, “ whether a man be a baron or not, he need only “ shew that he or his ancestor, to whom he is lineal “ heir, was summoned and sat in parliament, which “ is to be proved by the records of parliament ; “ and that there may be different titles of honour “ of the same name ; for peerages, though called “ baronies, in imitation of the local baronies to “ which they succeeded, were mere personal dignities, inherent in the blood of the person ennobled ; and there was no legal objection to the “ king’s summoning two men to parliament by “ the same surname.”†

The baronies of Clifford and Strange are not, however, the only baronies of which a new creation by the same name has been granted to heirs male on succeeding to the lands, whilst the former dignity continued vested in heirs general.

Edmund Deincourt was summoned to parliament from the 27th Edw. I. to the 20th Edw. II., and

Barony of
Deincourt.

* Cruise on Dignities, p. 234.

† Ibid. p. 226.

obtained a licence to settle his estates on his nephew and heir male. He died in 1327, leaving his grand-daughter his heir general; but, in the 6th Edw. III., his said nephew was summoned as Lord Deincourt.

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In the 23d Edw. I., Thomas de Berkeley was summoned to parliament, and the dignity descended to Thomas Lord Berkeley, who died without issue male in 1416; but the lands being entailed on the heir male, his nephew James de Berkeley was summoned to parliament in the 9th Hen. V., and his heirs have been allowed the precedence of the original barony.

Barony of
 Berkeley.

So lately as the reign of Elizabeth, the heir male of Thomas West, Lord la Warr, who died in 1554, was allowed the precedence of the ancient barony, although heirs general of that nobleman were then in existence; but in neither of the instances cited, can it be pretended that the rights of the heirs general are affected by the heirs male having been summoned to parliament and allowed the precedence of the original dignities; and there is no stronger reason for presuming that Irish baronies were confined to heirs male because in a few cases heirs male have been summoned on succeeding to the lands of their ancestors, than that such was the case in England because a similar circumstance has in three or four instances occurred in this country.

Barony of La
 Warr.

The cases of Berkeley and La Warr shew that in England, as well as in Ireland, the Crown has sometimes summoned an heir male when a dignity fell into abeyance; and it would seem that in former times, when a title fell into abeyance, it was

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considered to be absolutely at the King's disposal, or at least until the abeyance determined by the extinction of all the co-heirs but one. The right of the Crown to grant a dignity of the same name to an heir male of an ancient barony by writ is indisputable; and all which is pretended by Mr. Bryan is, that the Crown did exercise this right on four or five occasions, in the instance of the family of Fleming; that on each of those occasions the dignity so conferred fell into abeyance; and that three, if not four of the said dignities, are now in abeyance. The fifth creation (if it were not a determination of the fourth abeyance) he claims on the principle of law, which has been repeatedly and uniformly acted upon by the House; from which principle of law the title of no less than ten peers to sit in the present parliament is derived, which has prevailed for ages, and which forms an integral part of the law of the land; namely, that (in the absence of a patent) a writ, and sitting in parliament, create a dignity to the person so summoned, and the heirs of his body.

The point mainly relied upon by Mr. Fleming in support of his position, that the heirs male of the Fleming family, who were summoned to parliament as Barons of Slane, succeeded to that dignity by hereditary right, is, that they respectively enjoyed a higher precedency than could be derived from the first writ addressed to them; but such inference cannot be drawn from that circumstance.

Cases of
precedency.

The rules by which the precedency of peers was determined, whether in the parliaments of England or Ireland, in early times, are involved in much obscurity. Anciently was no doubt the general

criterion ; but the Crown possessed and often exercised the right of giving whatever precedency to a peer it thought proper ; and it is very difficult to state by what principle the question of ancienty was regulated. The Lords' Journals of England, in the reigns of Henry the Eighth, Edward the Sixth, Queen Mary, and Queen Elizabeth, clearly prove that the date of the first writ on record was not always the criterion ; and there is reason to conclude that barons, whose dignities were created before the reign of Henry the Sixth, sat, not according to any fixed rule derived from the date of their creations, but from precedents ; that to baronies of particular names a certain place in parliament was assigned ; and that the person who was summoned by that name was deemed to be entitled to that place, whether he was newly created to or inherited the dignity. That this custom prevailed in England appears from the following facts : —

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Henry Pole was summoned to parliament as Lord Montagu, in the 24th and 28th Hen. VIII., and was allowed the precedency of the barony of Montagu, created by writ in the 28th Edw. I.*, notwithstanding that the said original barony of Montagu was then in the Crown by attainder, and that his mother, through whom his pretensions to it were derived, was then living.

The barony of Stafford was created by writ in the 27th Edw. I., but was forfeited by the attainder of Edward Duke of Buckingham in 1521. In 1547, his son and heir Henry Stafford was created Baron of Stafford, to him and the heirs male of his body,

* Lords' Journals, vol. i.

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by act of parliament; and he took his seat as junior baron. He continued to sit according to the creation of 1547 until February, 1558, when he claimed, and was allowed, the precedency of his ancestors*, notwithstanding that the barony of which they were possessed was not vested in him.

In the cases of Berkeley and La Warr, a similar usage seems to have been acted upon.

In 1604, the barony of Abergavenny was allowed to Sir Edward Neville, not as a matter of right, but of royal grace and favour; and he sat above all barons, under the idea that it was the most ancient barony. This precedency is the more remarkable, because Sir Edward Neville's descent did not afford him the slightest pretensions, even as heir male, to any barony of Abergavenny of an earlier creation than the 16th Ric. II.; and it can only be explained by presuming that there was then an idea that to certain names of dignity a definite place in parliament was attached. The subsequent Barons of Abergavenny have always enjoyed the same place in parliament; and it is not necessary to anticipate what might be the result of an investigation on the subject.

The instances of Strange and Clifford, in 1628, tend still further to confirm the same opinion; but even so lately as the year 1817, a baron (Lord Percy) sat in the House of Lords in the precedency of the 27th Edw. I. 1299, though he was only entitled to precedency from the year 1722; and this case is of itself sufficient to refute the idea that the place in which certain lords have sat in parliament affords the slightest evidence of their right

* Lords' Journals.

to the dignities to which such precedence belongs.

Henry de Percy was summoned to parliament in the 27th Edw. I. 1299; and, after various forfeitures and restorations, the barony of Percy was vested in Henry Algernon Percy, sixth Earl of Northumberland, at his death in 1537. His brother and heir Sir Thomas Percy being attainted, the dignity fell to the Crown, and has never been restored. In 1557, Sir Thomas Percy (son and heir of the said Sir Thomas) was created Baron Percy, with remainder to the heirs male of his body; failing which, to his brother Sir Henry Percy and the heirs male of his body. He was subsequently elevated to the earldom of Northumberland, with the same limitation; and dying in 1572 without issue male, his five daughters and co-heirs became heirs to the ancient barony of Percy (which was then in the Crown by attainder), and the representation of that barony is now vested in their descendants. The barony of Percy (created in 1557), and earldom of Northumberland, devolved, however, according to the limitation, on Henry Percy, the Earl's brother and heir male; and in 1628, King Charles the First granted to the then Earl of Northumberland and Baron Percy, a confirmation of the barony of Percy to him and the heirs male of his body, "in such manner as any of his ancestors had enjoyed the same," which was, in truth, a grant of the ancient precedence, though the earl was not the heir to the original barony. The said barony of Percy became extinct on the failure of the heirs male of the grantees' bodies in 1670. In 1722, Algernon Seymour, son and heir of Elizabeth Duchess of Somerset, daughter and heiress of

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Josceline last Baron Percy, under the patent of 1557, was, on the death of his mother, summoned to parliament as Baron Percy, and placed in the precedency of the ancient barony, though he was not possessed of any barony of Percy until created to a new dignity of that name by the first writ addressed to him. His son Hugh Percy (afterwards Duke of Northumberland) having been summoned to parliament in 1777, as Baron Percy, he also sat in the same precedency; and when Hugh, the present Duke of Northumberland, was called up to the House of Peers in the barony of Percy, he likewise sat in the same place, and continued to do so until July 1817, when he succeeded his father in the dukedom of Northumberland.

These facts shew that no reliance is to be placed on precedency as evidence of right; and that the precedency allowed to the Barons of Slane cannot be deemed proof that they inherited the original barony.

That the rights of heirs general are not affected by the writs addressed to heirs male by the same title, or by the precedency which those heirs male have enjoyed, is self-evident; and appears by the judgment of the house in the cases of the baronies of Strange and Clifford, and by the existence of the two baronies of Clifford at the present moment.

The inference insisted upon by Mr. Fleming, that because the Barons of Slane enjoyed so high a precedency in the Irish parliament, it must be concluded that they succeeded to the original barony of Slane, instead of being created to new and distinct dignities of the same name, has not even the merit of novelty. Precisely the same

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argument was used in the claim to the barony of Strange in the year 1736, but without effect* ; and it is difficult to understand upon what grounds it can be expected to prevail in the face of the decisions respecting the baronies of Strange and Clifford in the last century ; the justice of which decisions is supported by the proofs that have just been cited of the laxity which has always prevailed on the subject of precedence, and by the well-known fact that the Sovereign often assumed the right of assigning to a peer whatever place in parliament he thought proper.

The reasoning of Mr. Fleming on the subject is fallacious ; and the House will not come to a different conclusion with respect to the precedence which the Barons of Slane have enjoyed, in reference to the creation and descent of the various baronies of that name, from that which the House formed in the case of the barony of Strange in 1736, or in that of the barony of Clifford in 1737 ; or different from what it would give to it in the instance of the baronies of Abergavenny, Percy, La Warr, or Berkeley, should a question be agitated respecting the proper precedence of those dignities.

Much is said in Mr. Fleming's case on the " consequences " of admitting that writs to and sittings in the parliament of Ireland created baronies to heirs general : an attempt appears to be made to excite hostility to Mr. Bryan's claim, on the pretence that its success would deprive some noble lords of their " splendid ancient baronies ; " but can this be put in comparison with the " inconve-

* Many of the arguments used on the claim to the barony of Strange in 1736, apply very strongly to Mr. Bryan's case. See Cruise on Dignities, pp. 227, 228.

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niences" which would arise from a decision establishing that, with respect to the ancient peerage of Ireland, the laws of the two countries are wholly distinct; that the King's writ of summons to an Irish parliament had not the creative power it possessed in England; and that honours exist in that kingdom independent of the king's charter, and independent of the only other mode of creation known to the laws of England? It may be asked, when the question was raised, in the reign of King Charles the First, if earldoms did not attract baronies*, whether the interests of many English earls were not as much involved as those of a few peers of Ireland at this moment? The House did not then listen to such considerations, and it is impossible to believe that it will do so now. It has always acted, and will no doubt continue to act, upon fixed principles of law, and will never allow its judgment to be warped by considering what may be most "convenient," instead of endeavouring to ascertain what is legally just.

The following are the legal propositions upon which Mr. Bryan's claim is founded:—

I. That the laws of Ireland are the same as the laws of England, excepting in cases of certain statutes.

II. That the dignity of the peerage, whether in Ireland or in England, can only be created in two ways; by patent, or by writ of summons.

III. That (in the absence of a patent) a writ of summons to and a sitting in the parliament of Ire-

* In the case of the barony of Grey de Ruthyn, see Collins's "Precedents of Baronies by Writ," pp. 195—260. The same question was raised on the claim to the barony of Fitz-Walter, in the year 1668. Ibid. pp. 268—290.

land, create a barony to the heirs of the body of the person first summoned ; because, as the writ is issued in the King's name, it must be held to possess the same legal effect as a similar writ to the parliament of England.

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IV. That the heir of the body of the person so summoned and sitting in the parliament of Ireland is entitled to the barony, without reference to any other circumstance whatever, excepting the existence or non-existence of a patent.

V. That as Christopher Fleming, and his son William Fleming, were summoned to and sat in the parliaments of Ireland, as Barons of Slane, and as no patent of that dignity was granted to either of them, an hereditary barony was created by the said writs and sittings to the heirs of the bodies of the said Christopher and William Lords Slane.

VI. That Mr. Bryan being the heir general of the body of the said Christopher and William Lords Slane, he is entitled to the said barony of Slane.

The case of Mr. Bryan was argued by Sir *W. Follett*.

The case of Mr. Fleming, by Mr. *Lynch*.

On the 31st of August, 1835, the opinion of the Committee was delivered by

LORD BROUGHAM. — My Lords, this case stood over for the purpose of considering the argument and proof adduced by one of the claimants, or rather I should say by the counter-claimant, Mr. Fleming, who is let in to contest the claim on the part of Major Bryan. Mr. Fleming was admitted after the case of Major Bryan had been closed, not

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to set up his own claim, but to resist the Major's claim, which, if it had been admitted, would have precluded him from ever arguing his case; though, if rejected, Mr. Fleming would still have to prove his own case; consequently he only appeared as it were on the same side with the counsel for the Crown, to contest the claim now before us. We expected to have heard an argument from the learned Attorney-General of Ireland; but I apprehend, by his not being here the last two days, that he is satisfied with the argument of Mr. Lynch for Mr. Fleming, and does not mean to urge anything further against the claimant's case.

A very able, certainly, and a very elaborate argument, was addressed to your Lordships by Mr. Lynch and Sir William Follett, at which my noble and learned friend (Lord Lyndhurst) was present, without whose assistance I should not have proceeded to-day, but that I know he takes entirely the same view of the subject as I do. A great portion, however, of that argument appears to me to have been unnecessary for supporting Mr. Lynch's proposition; for when he maintains that there is no such thing as a barony in fee (or fee-tail) in Ireland — no such thing as a barony conferred by writ of summons to parliament, and sitting there under the writ — this may be either true or not as a general proposition; and yet I do not see any necessity for grappling with it, or for disposing of it in order to arrive at a sound conclusion on the present case. The comparison of eleven or twelve old baronies in Ireland with as many old baronies in England, does certainly seem to shew that whereas these latter have gone from family to family, sometimes through as many as seven different changes,

and in all subject to at least two or three changes of family,—in Ireland, on the contrary, all those ancient baronies have gone invariably in the same family; a very strong argument no doubt to shew the difference of the two classes of baronies, because it is hardly conceivable that there should have been so many failures of heirs male in England in those families, and no such failures at all in any of the families holding the ancient baronies of Ireland. But it does appear to me, and to my noble and learned friend who assisted in hearing the case, that we need not form any opinion upon the general question for our present purpose, and in order to admit Mr. Lynch's right to call upon us to refuse the claim of Major Bryan. We are now upon this particular barony; we are upon the Slane peerage; and the circumstances which have attended its descent are such as leave no doubt whatever in my mind what the law of succession is in respect of this particular barony. The only question being upon the course of descent in this barony, if we find it clearly not such as to bring in heirs general in any one instance, but to exclude again and again the nearer female in favour of the more remote male heir, the question before us is decided, whatever may have been the case with other baronies in Ireland and England.

Now, my Lords, I never yet saw a case in which parties successfully contended for a claim of right, under a particular law of succession, maintaining that there was a certain canon regulating the descent, and in their favour, when there was clear proof of the honour in question having descended repeatedly in a different course and by a different rule. It is not merely that there were three or

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four exceptions, and undeniable exceptions, to the canon which the present claimant must establish ; but there was not a single instance in the family of his rule being followed. Who ever heard of a person obtaining a barony by writ or by a lost patent to heirs general, when again and again deaths had happened, and instead of the descent of the honours falling upon the only daughter, or being in abeyance among several daughters, the barony went away to a remote cousin, being a male ; sometimes a nephew, sometimes a more distant kinsman ? Such a fact shuts out the idea that there can be a barony in fee, or in fee-tail, more correctly speaking. One cannot suppose the parties were always slumbering over their rights, more especially after the very remarkable fact which occurs in this case, that the daughter of a deceased peer being in poverty was allowed 50*l.* a year pension, and did not take the barony, though, being in that case a peeress in her own right, she would have had considerably more than 50*l.* a year, as is proved by the fact of the male heir who took the honour obtaining at the same time 500*l.* a year. The lady had a strong interest in applying for the peerage, if there had been the least pretence for her claim, as she would have obtained an increase of the provision. It appears to me that until the difficulty I am now alluding to is got over, it is impossible for your Lordships to adjudge this peerage to the party claiming in such circumstances.

Although we have had, in many instances, the most satisfactory evidence of a remoter male having enjoyed the title to the exclusion of a nearer female, unquestionably there has been no sitting in parliament in many of those cases ; but this is

accounted for by the circumstance of the family being Catholic, and the peers being successively excluded by the penal laws after the beginning of the 18th century. So that the evidence is the most satisfactory which the nature of the case will allow of; and it is further to be observed, that your Lordships' resolution that Major Bryan has not made out his claim, does not decide the question finally: it does not decide that this person is not entitled, and may not hereafter prove his title; it disposes of no general question that there are or are not baronies by writ; it only declares that Major Bryan in this stage has not proved his claim. If your Lordships were to decide that he has proved his claim, that would shut out all pretensions on the part of Mr. Fleming; and it would decide the affirmative in the general question argued by Mr. Lynch, whether or not there is such a thing as an Irish barony in fee-tail.

I have another observation to make with respect to the law of this case. It is generally held that baronies in fee-tail go to the heirs general of the body; and that where a man has a writ of summons, and sits according to the exigency of that writ, the dignity descends to the heirs of his body, female as well as male. I know of no instance of any restriction to that generality; I know of no such thing as fee-tail special in a dignity; of a dignity by a writ going to the issue of a man by a certain wife; and, from the nature of the thing, I think it could not be. I know of no instance in England of a peerage in fee going to the heir male of the body; but perhaps this is not absolutely incompatible with the nature of the writ.

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There may possibly be a barony by summons and sitting, which should go to heirs male of the body, and not to heirs general of the body; I do not think it is wholly inconsistent with the nature of the thing. Supposing the summons were specially framed to A. B. to sit and serve in parliament; I do not see why it might not add, "and the heir male of his body;" at least it strikes me, that though this writ is personal, calling upon the party to come individually and sit, and that by the operation of the peerage law such writ, followed by sitting, carries the honour to the heir of his body, still if it should express it to be to A. B. and the heir male of his body — on the supposition that A. B. might have died before he came and sat according to the exigency of the writ, — I see nothing inconsistent in the heir male of the body sitting; I do not see any thing inconsistent in such a description carrying a barony in fee to the heir male, such heir male being designated rather by words of limitation than of purchase. I throw out this, however, as a possible supposition only: I think that there is nothing self-repugnant nor contrary to the principles of law in it, and such a supposition would reconcile the facts of this case with the course of the law. But at the same time we must admit, that such a writ to the heir male of A. B.'s body might also be said to give a peerage in fee-tail general to the person on suing this description who should first sit under it. There is no case nor any authority on this point.

My Lords, it is important that we should endeavour by all means to reconcile the apparent discrepancy between the English and the Irish law

of peerage. I am very unwilling to admit the idea of there being one law for England and another for Ireland in this respect ; and I listened with great attention to the argument of the late Attorney-General, the present Lord Chief Baron, to prove that the law as to honours was the same in England as in Ireland. I know there are incidents of peerage which differ it from the law of real estates ; nevertheless a title of honour is a tenement, and where the feudal law prevails all dignities are in their origin real property, being held as incident to land and by the like tenure, and being as much real estates as the land itself. I should therefore be very loath to adopt the proposition that there is one rule not only as to incidents but as to the original constitution and construction of an estate in an honour, and another as to the original constitution and construction of an estate of another kind. So should I feel as loath to hold that one rule prevailed in England and another in Ireland on this matter. There is, however, a supposition involving no doubtful point, and which will equally reconcile the facts with the course of the law, and assume that law to be the same in both countries. There may be a lost patent limiting to heirs male. This is inconsistent with nothing except a statement of Lord Coke's, that there was no barony by patent earlier than the 11th Richard II.; but it is very possible Lord Coke may be mistaken in this, which is only a point of legal or rather historical antiquity. Between the two difficulties, of supposing a different law in the two countries, and supposing a creation by patent earlier than the period assigned by Lord Coke, I have no hesitation in choosing the latter as the safer ; and to move your

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Lordships to determine and report that Major Bryan has not made out his claim.

Resolved, That the claimant George Bryan, Esq., hath not made out his claim to the barony of Slane, as claimed by his petition; and that the Chairman be directed to report the same to the House.

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ENGLAND.

(COURT OF CHANCERY.)

GEORGE JOY, HENRY HALL JOY, }
and ELIZABETH JOY - - - } *Appellants;*

WYRLEY BIRCH, GEO. WOLLASTON, }
EDWARD COKE, and GRACE his } *Respondents.*
wife, and FREDERICK G. SYMS - }

By deeds, executed in 1800, C. conveyed to J., subject to a mortgage, lands at T., to secure two annuities of 300*l.*, in consideration of two sums of 2000*l.* The deeds contained powers to repurchase by C., upon giving twelve months' notice in writing under his hand. In 1812 C. agreed to sell to B., who agreed to purchase for 95,000*l.* the lands at T., subject to the incumbrances; and B. entered into possession of the premises under the agreement, and paid the annuities to J.

In 1818 C. granted all his lands, &c. to J. and his heirs in trust, to sell and pay off the charges and incumbrances affecting the same. In 1824 C. agreed to give to J. a charge upon all the premises contracted to be sold to B., and the purchase-money to secure the payment of arrears of the annuities and interest thereon, and other claims of J.; and an account having been stated and settled between C. and J., by a deed executed in April, 1824, C. assigned to J. the balance due from B. in respect of the purchase-money, 95,000*l.* and interest, under the contract, subject to previous incumbrances, to be applied in payment of the amount found due to J. upon the account. In 1825 B. filed a bill in chancery, stating the agreement for purchase, the annuity deeds containing the power to repurchase, a treaty between him and J. for an immediate repurchase of the annuities, on failure of which, as it was alleged by the bill, he requested C., in performance of his agreement, to give J. such notice as was required by the annuity deeds, to enable C., or B. in his place, to repurchase the annuities, and that such notice was

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accordingly reduced into writing, and delivered to J., on behalf of C., on the 16th of April, 1823; that on the day mentioned in the notice the solicitors of B. and C. went to the residence of J. for the purpose of tendering to J. 4000*l.*, with all arrears of annuities and costs, and the deeds of transfer for execution; and, upon being informed that J. was absent from home, left a notice that the money and deeds were deposited at the house of the solicitors. The bill charged that J. claimed, but was not entitled to, interest upon the arrears of the annuities, and prayed against C. a specific performance, and against J. a declaration that the annuities had ceased according to the notice, with accounts, &c.

J. by his answer admitted the annuity deeds, and the contract between C. and B., and said that a notice signed "W. C.," by his attorneys E. and H., was served on him, J., but protested against the authority of E. and H. to interfere in the concerns of C., he, J., having previously received from C. an irrevocable power to act in the management and settlement of his affairs; and J. submitted that the notice was irregular and of no avail, not being in compliance with the terms of the annuity deed; and that after the notice had been given, and before the time limited therein had expired, C. had settled his accounts with J., admitting that the notice was not available, and treating the same as of no effect, and executed to J. an assignment of all the right and interest of C. in the purchase-money due from B. (under his contract with C.), for securing to J. the amount due to him on the said settlement of accounts, which was notified to B., and in consequence thereof no tender was made to J.

No witnesses were examined on behalf of B. the plaintiff in the suit; but the documents and principal facts stated in the answer of J. were proved by witnesses. The cause was heard before the Vice-Chancellor and a decree pronounced, declaring that the annuities ceased from the date of the notice, with directions consequent thereon, and this decree was affirmed by the Lord Chancellor on appeal; but upon further appeal to parliament the judgment was reversed, principally on the ground of defect in the proof of the notice, and that it contained no assignment of any place for the payment of the money, in which respect the proviso for repurchase in the grant was also defective.

BY indentures of lease and release, bearing date the 5th and 6th days of March, 1800, and duly

made and executed by and between William Colhoun, of the first part, the Appellant George Joy, of the second part, and Michael Joy, since deceased, of the third part; the said William Colhoun, in consideration of the sum of 2000*l*., paid to him by the Appellant George Joy, granted, released and confirmed unto the Appellant George Joy, and his heirs, the Manor or Lordship of Thorpe Hall, otherwise West Wretham, in the county of Norfolk, with the rights, members and appurtenances, and the site of the said Manor with the appurtenances: to hold the same unto the Appellant George Joy and his heirs; subject to a mortgage* to Josiah Holford for 12000*l*. and interest; to the intent that the Appellant George Joy, his executors, administrators and assigns, should receive out of the said premises, during the lives of William Wood and Lawrence Watson Wood, therein severally described, and the life of the survivor of them, one annuity, or clear yearly rent-charge of 300*l*., payable quarterly as therein mentioned, together with a proportionable part thereof up to the day of the death of such survivor: and in the now stating indenture was contained a clause or proviso, whereby it was declared that if the said annuity should be in arrear fourteen days, it should be lawful for the said George Joy, his executors, administrators or assigns, to enter and distrain upon the said premises, until the said annuity and all arrears thereof, and all the costs and charges attending such entry and distress, and the damages to be sustained by reason of the non-

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* It appears that some parts of the lands were subject to other charges, in respect of which John Rose Drew, &c. were probably made parties to the suit. See p. 200.

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payment of the said annuity, should be fully paid and satisfied; and that in case the said annuity should be in arrear thirty days, then that it should be lawful for the said George Joy to enter upon the said premises, and receive the rents thereof, until all arrears of the said annuity, and all costs and charges attending such entry and perception of rents, and all damages which the said George Joy should have sustained by reason of the non-payment thereof, should be fully paid and satisfied; and by the same indenture the said premises were limited to the use of the said Michael Joy, his executors, administrators and assigns, for the term of ninety-nine years, upon trust, in case the said annuity should be in arrear for sixty days, that the said Michael Joy, his executors, administrators and assigns, might, by and out of the rents and profits, or by mortgage or sale, of the premises comprised in the said term, raise the arrears of the said annuity, together with all such damages, loss, costs, charges, and expences, as he the said Michael Joy, his executors, administrators or assigns, or as he the said George Joy, his executors, administrators or assigns, should sustain by reason of the non-payment, or otherwise, in execution of the trusts of the said term: and by the now stating indenture it was agreed that in case the said William Colhoun, his heirs, executors, administrators or assigns, should, at any time after the 6th day of March, 1804, be desirous of repurchasing the said annuity, and should give twelve calendar months notice thereof in writing under his or their hand or hands, that then the Appellant George Joy, his executors, administrators or assigns, on receiving all arrears of the said annuity, would accept the sum of 2000*l.* in

full for the purchase thereof, and would thereupon release and surrender the several securities for the same unto the said William Colhoun, his heirs, executors, administrators or assigns.

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By indentures of lease and release, bearing date respectively the 8th and 9th days of May, 1800, and duly made and executed by and between the said William Colhoun, of the first part, the Appellant George Joy, of the second part, and the said Michael Joy, of the third part, the said William Colhoun, in consideration of 2000*l.* paid to him by the Appellant George Joy, granted, released, and confirmed unto the Appellant George Joy, and his heirs, all that the said Manor or Lordship of Thorpe Hall, otherwise West Wretham, and the site of the said Manor, with the appurtenances: to hold the same, unto the Appellant George Joy and his heirs; subject to the said mortgage to the said Josiah Holford, for 12,000*l.* and interest, and the said before-mentioned annuity of 300*l.*; to the intent that the Appellant George Joy, his executors, administrators and assigns, should receive out of the said premises, during the lives of Abraham John Valpy and George Homer Joy, therein severally described, and the life of the survivor of them, one annuity or clear yearly rent-charge of 300*l.*, payable quarterly as therein mentioned, together with a proportionable part thereof up to the day of the decease of such survivor: and the now stating deed contained similar powers of distress and entry, and similar trusts, of a term of ninety-nine years, thereby limited to Michael Joy, as were contained in the first grant: the deed also contained a power of repurchase of the annuity at the sum of 2000*l.*, similar in terms

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to the proviso for that purpose contained in the first grant.

On the 22d of February, 1812, William Colhoun entered into and concluded an agreement with the Respondent Wyrley Birch for the absolute sale to him of the said Manor of Thorpe Hall, and the site thereof, and all the other messuages, farms, lands, hereditaments, and premises, of him William Colhoun, therein called the Wretham Estate, including the premises comprised in the before-mentioned grants of annuities; the agreement was reduced into writing; and such written agreement, bearing date the 22d day of February, 1812, was signed by William Colhoun and Wyrley Birch, and Wyrley Birch thereby agreed with William Colhoun for the absolute purchase of the said Manor, messuages, farms, hereditaments and premises, subject to such incumbrances, and to the conditions therein mentioned, at or for the price or sum of 95,000*l*.

On the 24th day of October, 1812, a further agreement was entered into between William Colhoun and Wyrley Birch for the purpose of facilitating the completion of the purchase of the Wretham Estate, by which it was agreed that Wyrley Birch was to be put into the possession of the said Estate, upon certain conditions therein mentioned. Shortly after the execution of the last-mentioned agreement, the Respondent Wyrley Birch got into the possession of all the estates and premises comprised in the before-mentioned agreement, or into the receipt of the rents and profits thereof, and, after he had obtained possession of the estates, paid the Appellant George Joy several sums of money in respect of his annuities.

By indentures of lease and release, bearing date respectively the 12th and 13th days of October, 1818, and made between William Colhoun of the one part, and the Appellant George Joy of the other part; for the considerations therein mentioned, William Colhoun granted, released, and confirmed unto the Appellant George Joy, and his heirs, all and singular the manors, messuages, farms, lands, hereditaments and real estates, in Great Britain and Ireland, whereof or whereto the said William Colhoun, or any other person or persons in trust for him, was or were seized or entitled, or over which he, the said William Colhoun, had any beneficial power or right of disposition, with the appurtenances: to hold the same unto and to the use of the said George Joy, his heirs and assigns for ever; subject to the charges and incumbrances affecting the same; upon trust, of his or their own proper authority, to sell, dispose of and convey the same, as therein mentioned, and with all necessary powers for that purpose; and upon trust to stand possessed of the monies arising from such sales in the first place, to retain and pay the expences of preparing and executing those presents, and of executing the said trusts; and in the next place to pay off and satisfy all the charges and incumbrances affecting the said premises or any part thereof; and to pay the surplus of the said trust-monies unto the said William Colhoun, his executors or administrators, or as he or they should direct or appoint. The object of this deed was alleged to be to enable George Joy to complete the contracts with Wyrley Birch.

In the month of April, 1824, the Appellant George Joy, being unable to obtain payment of

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the arrears of his annuities, and also having other demands against the said William Colhoun, the said William Colhoun agreed to give the Appellant George Joy a charge upon all the hereditaments and premises contracted to be sold to the Respondent Wyrley Birch, and the purchase-money due for the same from Wyrley Birch, for the amount of the arrears of the said annuities, and the interest on such arrears, and for the other claims of the Appellant George Joy against him the said William Colhoun.

On the 3d day of April, 1824, an account of the arrears of the said annuities and of the interest thereon, and of the other claims and demands of the Appellant George Joy against William Colhoun, was settled and stated, between the Appellant George Joy and William Colhoun, up to the 6th day of April, 1824, and the amount thereof ascertained up to that day.

After the account had been so settled, an indenture of assignment, bearing date the 6th day of April 1824, was duly made and executed by and between the said William Colhoun of the one part, and the Appellant George Joy of the other part: and thereby the said William Colhoun assigned to the Appellant George Joy the balance of the purchase-money or sum of 95,000*l.* and interest, to arise by the sale of the said property, contracted to be purchased by the Respondent Wyrley Birch, after payment thereof of the then incumbrances upon or legally affecting the same: to hold the said purchase-money and interest, unto the Appellant George Joy, upon certain trusts, for securing the payment of the amount due to him upon the balance of the before-mentioned account.

Shortly after the date and execution of the said

indenture of assignment, the Appellant George Joy gave notice of the same indenture and the contents thereof to the Respondent Wyrley Birch, and considerable negotiation took place between the Appellant George Joy and Wyrley Birch and his solicitor, respecting the Appellant George Joy's demand in respect of the arrears of the said annuities, and under the said deed: the Respondent Wyrley Birch ultimately refused to pay the same or any part thereof.

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On the 10th day of July, 1825, Michael Joy, the trustee named in the grants of annuities, died, having made his will, whereby he appointed the Appellants, Henry Hall Joy and Elizabeth Joy, his executor and executrix, who, on the 23d of October, 1825, proved the will in the proper ecclesiastical court.

On the 25th day of October, 1825, the Respondent Wyrley Birch exhibited his bill of complaint in his Majesty's High Court of Chancery, which was afterwards amended, pursuant to an order of the said Court, dated the 21st day of November, 1825, and such amended bill was against the Appellants George Joy, Henry Hall Joy, and Elizabeth Joy, and the said William Colhoun, and also against John Rose Drew and Priscilla Wollaston, since deceased, and the Respondent George Wollaston, as Defendants thereto.

The bill stated, among other things, the contract between William Colhoun and Wyrley Birch, of the 22d day of February, 1812, and the further agreement of the 24th day of October, 1812; and that in pursuance of the said last-mentioned agreement he, the said Wyrley Birch, was put into possession of the said estates, and into the receipt of the rents and profits thereof, and had

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ever since been and still was in such possession and receipt, and that out of the said purchase-money he had paid off various charges and incumbrances on the said estates, to a very considerable amount : the bill also stated the before-mentioned indentures or grants of annuities of the 5th and 6th days of March, 1800, and the 8th and 9th days of May, 1800, and that the Respondent Wyrley Birch had paid the Appellant George Joy various sums in respect of the said annuities; and that being desirous of paying to the Appellant George Joy what might be justly due to him, and exonerating the estate and premises from the claims which the Appellant George Joy might have thereon, he had requested the said William Colhoun, in performance of the said agreements, to give to the Appellant George Joy such notice as was required by the said annuity deeds to enable him, the said William Colhoun, or the Respondent Wyrley Birch in his place, to repurchase the said annuities : and that such notice was accordingly reduced into writing, and duly delivered to the Appellant George Joy, on behalf of the said William Colhoun, on the 14th day of April, 1823.

The bill further stated, that pursuant to such notice, and on the 5th of May, 1824, the day mentioned in the notice, Mr. Tooke, the said Wyrley Birch's solicitor, and on his behalf, and Mr. Syms on behalf of the said William Colhoun, went to the Appellant George Joy's residence in New Ormond Street, for the purpose of tendering the sum of 4000*l.*, together with all arrears of the said annuities, and the costs and expences incurred by the Appellant George Joy in recovering the payment of the consideration money for the same ; and also for the purpose of tendering the deeds of

transfer of the said annuities, for the execution of the Appellant George Joy; but that the said Mr. Tooke and Mr. Syms were then informed that the Appellant George Joy was from home, and gone to Guernsey or Jersey; and thereupon they left at his house a written notice in the words and figures, or to the purport and effect following; that is to say: “Sir,—You are desired to take notice, “that we have this day attended at your residence, “No. 24, New Ormond Street, Bedford Row, for “the purpose of tendering to you the payment in “money of the principal and arrears due to you “upon the two several annuities of 300*l.* each, “charged upon a certain manor, messuage, farms, “lands and hereditaments, called Thorpe Hall, in “the parishes of East and West Wretham, or one “of them, in the county of Norfolk, late the estate “of William Colhoun, Esq., and contracted by him “to be sold to Wyrley Birch, Esq., together with “the payment of all reasonable charges and expences incurred by you in recovering the payment of the same; and together also with the deeds of transfer of the said annuities, and other securities, the draft of which deeds of transfer have been submitted to Messrs. Amory and Coles, your solicitors, for perusal on your behalf. And we do hereby give you further notice, that the money for the discharge of the said principal and arrears, together with your reasonable costs and charges as aforesaid, and with the other deeds of transfer will remain at the office or chambers of Messrs. Tooke and Carr, situate in Holborn Court, Gray’s Inn, for the space of ten days from the date hereof, for the purpose of being paid over to you, when you shall apply for the same

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“ money, and shall execute the said deeds of transfer, pursuant to the covenant contained in the grants of the said annuities respectively. Dated this 5th day of May, 1824. (Signed) Tooke and Carr for the said Wyrley Birch, and Frederick George Syms for the said William Colhoun.”

The bill further stated, that no conveyance of the said annuities had ever been executed by the Appellant George Joy and Michael Joy in his lifetime, and the Appellants Henry Hall Joy and Elizabeth Joy, since his decease, or either of them, to the said William Colhoun, or the Respondent Wyrley Birch, nor had any conveyance of the estates and premises, or any part thereof, been executed by the said William Colhoun, to the Respondent Wyrley Birch: that the said John Rose Drew and George Wollaston, and the said Priscilla Wollaston, claimed to be entitled to certain charges upon the said estate and premises, or the said purchase-money, to a very considerable amount: that the Respondent Wyrley Birch had offered to perform his part of the said agreement with the said William Colhoun, and to pay the remainder of the said purchase-money, after the payment of the incumbrances affecting the same, and which he was authorized by the said agreement to pay, as he the said William Colhoun should direct; and that he, the Respondent Wyrley Birch, had also offered to pay to the Appellant George Joy, what was justly due to him in respect of the said two annuities as aforesaid; but that the said William Colhoun, and the Appellant George Joy, refused to comply with such requests.

The bill charged, that the Appellants pretended that according to the terms of the conditions of

repurchase in the said indentures of the 6th day of March, 1800, and the 9th day of May, 1800, contained, the Appellant George Joy was entitled to receive, not only the several sums of 2000*l.* and 2000*l.*, and the arrears due upon the said two annuities respectively to the said 5th day of May, 1824, and his reasonable costs, and which the Respondent Wyrley Birch tendered or offered to pay, but that he, the Appellant George Joy, was entitled to receive and be paid interest also at the rate of 5*l.* per cent. upon the arrears of the said annuities respectively, from the time when such arrears respectively became due, and also the sum of 1000*l.* for expences incurred, as he alleged, on account of such arrears: whereas the Respondent Wyrley Birch charged the contrary thereof, but that nevertheless the Appellant George Joy absolutely refused to permit the said annuities respectively, or either of them, to be repurchased or redeemed, unless the Respondent Wyrley Birch consented to pay such interest and expenses: and that the said William Colhoun, colluding with the Appellant George Joy, refused to complete the said agreement with the Respondent Wyrley Birch, by executing a conveyance of the said estates, until such unjust demands of the Appellant George Joy were complied with, and had actually given the Respondent Wyrley Birch notice to pay the same to the Appellant George Joy, in preference to previously existing incumbrances on the said estate, and had also conveyed to the Appellant George Joy all his interest in the residue of the said purchase-money.

The bill further charged, that the Appellant George Joy insisted for the reasons aforesaid, or for some other reason, or under some other pretext,

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that he was entitled still to the benefit of the said annuities, and that the same or either of them had not ceased or been determined: whereas the Respondent Wyrley Birch charged the contrary thereof; and that under the circumstances thereinbefore mentioned, the said annuities respectively ceased and determined, and ought to be declared to have ceased and determined, on or from the said 5th day of May, 1824.

The bill prayed, that William Colhoun might be compelled, by the decree of the Court of Chancery, specifically to perform the said agreements on his part, and to execute to the Respondent Wyrley Birch a good and sufficient conveyance of the said estates and premises, according to the terms of the said agreements, and to deliver up to the Respondent Wyrley Birch the possession of the several title-deeds, instruments, maps, plans and writings relating thereto; the Respondent Wyrley Birch being willing specifically to perform the said agreements in all respects on his part, and being willing, and thereby offering, to pay to the said William Colhoun, or according to his direction, the residue, if any, of the said purchase-money, after paying thereout such incumbrances affecting the estates and premises, as, under the terms of the said agreements, the Respondent Wyrley Birch was authorised to pay; and for enabling the Respondent Wyrley Birch thereto, that the priorities of the said incumbrances might be ascertained and determined by the direction and decree of the Court: and that it might be declared, that the two several annuities of 300*l.* and 300*l.* charged on the said estates, as thereinbefore mentioned,

ceased, and determined, on the 5th day of May, 1824: and that an account might be taken, by and under the direction and decree of the said Court of Chancery, of the arrears of the said annuities respectively, which accrued due on and prior to the 5th day of May, 1824, and of the costs and expences, reasonably incurred by the Appellant George Joy in respect of such arrears: and that on payment of what should be found due, together with what should be due on the two several sums of 2000*l.* and 2000*l.* to the Appellant George Joy, and which the Respondent thereby offered to pay, the Appellants might be decreed to make and execute all deeds, and do all such acts as might be necessary to reconvey, transfer, and assign the said two annuities, and all securities for the same to the Respondent Wyrley Birch: and that in the mean time, the Appellants might be restrained, by the order and injunction of the said Court of Chancery, from commencing or prosecuting any action or actions at law, or taking out execution, or any other proceedings at law, against the Respondent Wyrley Birch, or the said estates, or any of them, or the tenants thereof, for compelling payment of the said annuities, or either of them, or any arrears thereof: and for general relief.

Priscilla Wollaston had died before the filing of the said original bill.

The Appellant George Joy filed his answer to the original and amended bill of complaint on the 23d May, 1826; and thereby, among other things, stated that he had been informed, and believed, that the said William Colhoun was, at the time in the said bill mentioned, seized in fee simple of, or

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entitled to, the several messuages, farms, lands, tenements and hereditaments, estates and premises, in the said bill mentioned : and that about the time in the said bill mentioned, the Respondent Wyrley Birch did enter into and conclude an agreement with the said William Colhoun, for the absolute purchase thereof, subject as in the said bill mentioned. And the Appellant George Joy, by his said answer, admitted it to be true that the Respondent Wyrley Birch did discover that the estate and premises were charged with two annuities of 300*l.* each, which were granted to the Appellant George Joy by the said William Colhoun many years ago, and which the Appellant George Joy, by his said answer, submitted were good and valid annuities, and well and properly charged upon the said estate and premises, or some parts thereof. And the Appellant George Joy, by his said answer, admitted it to be true, that such indentures of lease and release as in the said bill mentioned, to bear date the 5th and 6th days of March, 1800, were duly made and executed by and between the several parties thereto, and that the said indenture of release was between such parties, and of or to the purport or effect in the said bill in that behalf mentioned; and that such other indentures of lease and release respectively as in the said bill mentioned, were duly made and executed, and that the release was between such parties and to such purport or effect as in the said bill mentioned and set forth, as far as the same was set forth.

The Appellant George Joy by his answer admitted that the Respondent Wyrley Birch was in possession of the estate, and in the receipt of the rents and profits thereof; and stated

that he had been informed by the said William Colhoun, and believed that the Respondent Wyrley Birch did not request the said William Colhoun to give the Appellant George Joy such notice as in the said bill mentioned ; but the Appellant George Joy by his said answer admitted it to be true that a notice, signed " William Colhoun by his attornies, Edward Coke and P. A. Hanrott," was served on him the Appellant George Joy. And he stated that he had always protested against the authority of the said Edward Coke and P. A. Hanrott to interfere in the concerns of the said William Colhoun, he, the Appellant George Joy, having, previously thereto, received from the said William Colhoun, an irrevocable power of attorney, at the instance of the said Edward Coke, and on the refusal of the said P. A. Hanrott to act in the management and settlement of the affairs of the said William Colhoun. And he submitted, for the reasons therein mentioned, that the said notice so given was altogether irregular and informal, and of no avail, inasmuch as the same was not in compliance with the terms of the said annuity-deed, which required that the notice to be given for the repurchase of the said annuity should be in writing under the hand of the said William Colhoun. He stated, that after the said notice had been so given, and before the time mentioned therein had expired, the said William Colhoun had settled his accounts with the Appellant George Joy, admitting that such notice was not available, or treating the same as of no effect ; and that the said William Colhoun executed to the Appellant George Joy an assignment of all his the said William Colhoun's right and interest in the said purchase-money, for

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securing to him, the Appellant George Joy, the payment of the amount due to the Appellant George Joy on the settlement of such accounts; which assignment, on the Appellant George Joy's return to England, was duly notified to the Respondent Wyrley Birch, and that in consequence thereof no tender was made to the Appellant George Joy.

The Appellant George Joy by his answer further stated that he had been informed, and believed that pursuant to such notice, and at or about the time in the said bill mentioned, which was the day in the said notice mentioned for the repurchase of the said annuity, the said Mr. Tooke, on behalf of the Respondent Wyrley Birch and Mr. Symms, pretending to act on the behalf of the said William Colhoun; but as the Appellant George Joy believed without his knowledge or any authority from him, went to the Appellant George Joy's residence in New Ormond Street, for the purposes in the said bill mentioned; and that the said Mr. Tooke and Mr. Symms were then informed, as the fact was, that the Appellant George Joy was then from home: but he said that he could not set forth whether they were informed that he, the Appellant George Joy, was gone to Guernsey or Jersey, the Appellant George Joy having been previously to the island of Jersey, but having left the same about three weeks before such enquiry was made. He further stated that he believed it to be true that at the time in the said bill mentioned, the said Mr. Tooke and Mr. Symms did leave, at the house of the Appellant George Joy such written notice as in the said bill mentioned; to which said notice he craved leave to refer. The Appellant George Joy, by his answer, submitted that the Re-

spondent Wyrley Birch was not, by virtue of the aforesaid agreement, entered into by the Respondent Wyrley Birch with the said William Colhoun, entitled to all the rights and privileges of the said William Colhoun, in respect to the power to repurchase the said two annuities from the Appellant George Joy, no conveyance of the said estates having been made to the Respondent Wyrley Birch by the said William Colhoun, and the said William Colhoun having by a subsequent deed recognised the annuities, and directed them to be kept on foot.

He stated that the amount of his claim down to the 6th day of April, 1824, was ascertained and admitted by the said William Colhoun, and the account settled, and the deed of assignment executed by him, and which the Appellant George Joy, by his said answer, claimed to be allowed accordingly, together with what had subsequently accrued due: and he submitted and insisted that the said annuities could not be discharged during the continuance of the only life for which each annuity was then held. He further stated, that the sum of 1000*l.* in the said bill mentioned, was not, as in the said bill set forth, so much over and above his reasonable costs, but was in fact the reasonable and admitted amount of the Appellant George Joy's costs and expences, time and trouble, incurred in seeking to recover what was justly due to him in respect thereof, down to the date of the 25th October, 1817, and which amount having been allowed by the said William Colhoun, the Respondent Wyrley Birch undertook or agreed to pay, but which he afterwards refused to do; and he submitted that, under such circumstances, he

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did require payment thereof. He further stated that the amount of his claim up to the 25th of October, 1817, appeared in the accounts which had been rendered by him to the said William Colhoun, and for the payment of which he gave an order on the Respondent Wyrley Birch at that time, and which demand of the Appellant George Joy on the said William Colhoun, together with the sum since accruing due, had been since recognised and confirmed by him, and in particular by the deed of assignment of the month of April, 1824: and that under the said agreement with the said William Colhoun, who (there being but one life on which each of the said annuities was held) was desirous to keep the said annuities on foot, and directed the Respondent Wyrley Birch to place a sufficient sum, part of the purchase-money, out on security, for paying the instalments to the Appellant George Joy, he the Respondent Wyrley Birch agreed so to do, but afterwards broke his agreement. And the Appellant George Joy, by his said answer, insisted that his demands were just, and that they had been ascertained and allowed by the said William Colhoun, down to the date of the said assignment; and that the demands of the Appellant George Joy were founded on such settlement, adjustment, or allowance, and on the principle established and admitted thereby.

On the 23d of May, 1826, the Appellants, Henry Hall Joy and Elizabeth Joy, filed their answer to the original and amended bill of complaint, without oath or signature, pursuant to an order of the Court of Chancery.

The several other Defendants to the original and amended bill of complaint, except Priscilla

Wollaston, who was dead, put in their answers thereto, and the Respondent, Wyrley Birch, having replied to the answers, the cause was at issue.

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Before any further proceedings were had in the cause, namely, on the 19th of April, 1829, William Colhoun died, whereby the suit and proceedings became abated as to him.

On the 16th day of November, 1829, the Respondent Wyrley Birch filed his bill of revivor and supplement in the court of Chancery, against the Respondents, Edward Coke, and Grace his wife, and Frederick George Syms, as Defendants thereto: the bill of revivor, among other things, stated, that the said William Colhoun departed this life intestate, leaving Grace, the wife of Edward Coke, Esq., his only child, and heiress at law, him surviving; and that upon the death of the said William Colhoun, all his right and interest of and in the said hereditaments and premises in the said bill mentioned, descended upon and became vested in the said Grace Coke, as his heiress at law. The bill of revivor further stated that on the 2d of May, 1829, letters of administration of the personal estate and effects of the said William Colhoun, were duly granted by the ecclesiastical court of the Archbishop of Canterbury, to the said Frederick George Syms, and that the said Frederick George Syms thereby became the legal personal representative of the said intestate William Colhoun: and the bill of revivor and supplement prayed, that the Respondents, Edward Coke, and Grace his wife, and the said Frederick George Syms, might answer the several matters aforesaid, and that the said suit and proceedings might stand and be revived against the

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Respondents Edward Coke, and Grace his wife, and Frederick George Syms, and that the Respondent Wyrley Birch might have the same relief against them the said Edward Coke, and Grace his wife, and Frederick George Syms, according to their respective liabilities, as the Respondent Wyrley Birch was entitled to against the said William Colhoun ; or that the said Edward Coke, and Grace his wife, and Frederick George Syms might shew good cause to the contrary.

The Respondents Edward Coke, and Grace his wife, and Frederick George Syms, duly appeared to the said bill of revivor and supplement, and put in their answers thereto ; and the said suit was duly revived against the Respondents Edward Coke, and Grace his wife, and Frederick George Syms, by an order of the court of Chancery, bearing date the 21st day of November, 1829.

John Rose Drew departed this life some time in the year 1830, but the said suit was never revived against his representatives, or any proceedings consequential on his death taken.

No witnesses were examined in the cause on the part of the Respondent Wyrley Birch ; but the execution of the power of Attorney from Colhoun to Coke and Syms was proved *vivâ voce* at the hearing.

On the part of the Appellants George Joy, Henry Hall Joy, and Elizabeth Joy, divers witnesses were examined in the cause ; and the depositions of such witnesses proved, among other things, the due execution of the indentures of the 5th and 6th days of March, 1800 ; the due execution of the indentures of the 8th and 9th days of May, 1800 ; and the due execution of the inden-

tures of the 12th and 13th days of October, 1818 ; the settlement by William Colhoun and the Appellant George Joy in the month of April, 1824, of the accounts between them, relating to the arrears of the said annuities, and the interest thereon, and the other demands of the Appellant George Joy against the said William Colhoun, up to the 6th day of April, 1824, after examination thereof by the said William Colhoun, and his agents ; and also proved a letter of the said William Colhoun, dated Jersey, the 3rd day of April, 1824, wherein he stated that he had examined and approved of the said accounts, with the exception of a trifling error therein mentioned, which he had corrected ; and another letter of the said William Colhoun, dated Jersey, the 3rd of April, 1824, wherein he stated it to be his wish that the said annuities should continue ; the due execution, by the said William Colhoun, of the indenture of assignment of the 6th day of April, after examination of the before-mentioned accounts, as alleged in the answer of the Appellant George Joy.

The depositions also proved several other letters and documents written and executed by William Colhoun, which tended to establish the case of the Appellant George Joy, as stated in his answer.

The cause came on to be heard before his honour the Vice-Chancellor, on the 23rd day of February, 1830 ; when upon hearing the before-mentioned exhibits, and the proofs taken in the cause, his honour the Vice-Chancellor made a decree in the cause, whereby it was declared that the agreements in the pleadings mentioned bearing date respec-

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tively the 22nd day of February, 1812, and the 24th day of October, 1812, ought to be specifically performed, and carried into execution: and it was decreed accordingly. And it was declared that the annuities of 300*l.* and 300*l.* in the pleadings mentioned, ceased and determined on the 5th day of May, 1824, when the notices to repurchase the said annuities, stated in such decree to have been admitted by the Appellant George Joy, by his answer to the original bill, to have been given by the said William Colhoun to the Appellant George Joy, expired. And it was ordered that it should be referred to the master of the said court in rotation, to take an account of what remained due to the Appellant George Joy, for the arrears of the said annuities which accrued due up to the said 5th day of May, 1824. And it was declared that the Respondent Wyrley Birch was entitled to a reconveyance of the terms created for the security thereof, upon payment to the Appellant George Joy, of the sums of 2000*l.* and 2000*l.*, for the purchase-money of the said annuities; and also upon payment to the Appellant George Joy of what should be found due for such arrears thereof. And it was ordered that it should be referred to the said master, to enquire and state to the court what were the incumbrances affecting the estates comprised in the said agreements respectively, at the date of the said agreements, and to state their respective priorities; and what sum or sums of money had at any time since the date of the said agreement been paid by the Respondent Wyrley Birch, in respect of such incumbrances, or of any or either of them, out of the purchase-moneys for the said estates; and what was due for principal and interest

upon such incumbrances respectively. And it was ordered that the said master should enquire and state to the Court what remained due from the Respondent Wyrley Birch, in respect of the purchase-money for the estates comprised in the said agreement. And for the better taking the said accounts and discovery of the matters aforesaid, the parties were to produce before the said master upon oath, all deeds, books, papers, and writings, in their custody or power, relating thereto; and were to be examined upon interrogatories, as the said master should direct, who, in taking the said accounts, was to make unto the parties all just allowances. And the Court reserved the consideration of all further directions, and of the costs of the suit, until after the master should have made his general report.

The Appellants, George Joy, Henry Hall Joy, and Elizabeth Joy, presented their petition of appeal in the cause to the Lord Chancellor, on the 2d day of April, 1831, from those parts of the decree, whereby it was declared that the annuities of 360*l.* and 300*l.*, in the pleadings mentioned, ceased and determined on the 5th day of May, 1824; and whereby it was stated that notices to repurchase the said annuities were admitted by the Appellant George Joy, by his answer to the said original bill, to have been given by the said William Colhoun to the Appellant George Joy; and whereby it was ordered that it should be referred to the master of the said Court in rotation, to take an account of what remained due to the Appellant George Joy, for the arrears of the said annuities, which accrued due up to the said 5th day of May, 1824; and whereby it was declared that the Respondent Wyrley Birch

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was entitled to a reconveyance of the terms created for the security thereof, upon payment to the Appellant George Joy, of the sums of 2000*l.* and 2000*l.*; and also upon payment to the Appellant George Joy, of what should be found due for such arrears thereof: and the Appellants prayed his Lordship to rehear the said cause, as to such parts of the said decree, and to alter and vary the said decree, as to those parts, and in the respects by the Appellants complained of; and also to alter and vary the said decree, by referring it to the master to enquire and state to the Court what were the incumbrances affecting the purchase-money of the said estates, comprised in the said agreements of the 22d day of February, 1812, and the 24th day of October, 1812; and what was due for principal and interest on such incumbrances, or otherwise in that respect, as to his Lordship should seem just.

The appeal came on for hearing before the Right Honourable the Lord High Chancellor, on the 10th day of August, 1831, when his Lordship was pleased to order that the said decree should be affirmed with costs to be taxed by the master, and that the 20*l.* deposited with the registrar on setting down the petition of appeal, should be paid to the solicitors of the Respondent Wyrley Birch, in part of such costs.

This order, and also the decree of the Vice-chancellor, were passed and entered, of record in the High Court of Chancery.

The appeal to the House of Lords was from those parts of the decree of the Vice-chancellor of the 23d February, 1830, whereby it was declared that the said annuities of 300*l.* and 300*l.* in the pleadings mentioned, ceased and determined on

the 5th day of May, 1824, and whereby it is stated that notices to repurchase the said annuities were admitted by the Appellant George Joy, by his answer to the said original bill, to have been given by the said William Colhoun to the Appellant George Joy; and whereby it was ordered that it should be referred to the master of the said Court, to take an account of what remained due to the Appellant George Joy, for the arrears of the said annuities, which accrued due up to the said 5th day of May, 1824; and whereby it was declared that the said Wyrley Birch was entitled to a reconveyance of the terms created for the security thereof, upon payment to the Appellant George Joy of the sums of 2000*l* and 2000*l*, and also upon payment to the Appellant George Joy of what should be found due for such arrears thereof. And from the order of the Lord High Chancellor of the 10th day of August, 1831, affirming the said decree; and the Appellants also prayed that the said decree might be further varied by referring it to the master, to inquire and state to the Court what were the incumbrances affecting the purchase-money of the estates comprised in the agreements of the 22d day of February, 1812, and the 24th day of October, 1812, and what was due for principal and interest on such incumbrances.

For the Appellants, Mr. *Knight* and Mr. *Sharpe*.

The notices by the bill alleged to have been given to the Appellant George Joy, to repurchase the said annuities on the 5th day of May, 1824, were not pursuant to the terms of the provisoes, for that purpose contained in the said grants of annuities of the 5th and 6th days of March, 1800, and the 8th and 9th days of May, 1800. The

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power of attorney was insufficient and inoperative as to notice. General words are qualified by the recitals of a deed, and confined to the subject matter of the instrument; *Thorpe v. Thorpe**, *Oliver v. Daniel*†, *Simons v. Johnson*‡, *Payler v. Homersham*§, *Solby v. Forbes*.|| No place is fixed for the payment. There is no evidence that the notice was not given by or upon the suggestion of Birch. If valid, it was a notice of Colhoun, and he was estopped, and the supposed notice avoided before it was to take effect.

Even if the notices alleged to have been given to the Appellant George Joy, should be considered to be according to the terms of the provisoes contained in the grants of annuities, it was neither proved in the cause, nor admitted by the Appellant George Joy, that such notices had in fact been given to him, nor that any tender had been made of the sum of 4000*l.*, the repurchase-money of the annuities, together with all the arrears of the annuities, and the costs and expenses incurred by the Appellant George Joy, in recovering the payment of the said annuities on the 5th day of May, 1824, the time mentioned in the said notice; nor that William Colhoun, or any agent on his behalf, was in fact prepared to make such tender at that time. Tender only stops interest where money is lying dead; *Gyles v. Hall*.¶ To make a tender valid** there must be an exhibition of the money or

* 1 *Ld. Raym.* 235.

† 1 *Meriv.* 500. note.

‡ 3 *Barn. & Adol.* 175.

§ 4 *M. & S.* 423.

|| 2 *Bro. & B.* 38.

¶ 2 *P. W.* 378.

** See *Leatherdale v. Sweepstone*, 3 *Car. & P.* 342.; *Church v. Bishop*, 2 *Ves. sen.* 372.; *Garforth v. Bradley*, 2 *Ves. sen.* 678.; *Meade v. Bandon*, 2 *Dow.* 268.; and *MSS. pen. Aut.*

a dispensation express or implied; *Thomas v. Evans*.* As to what the Appellant would have done upon supposition of such a case it is not allowable to speculate. In *Levy v. Lord Herbert*†, *Wilkes v. Atkinson*‡, and *Wilmot v. Wilkinson* §, the arguments are founded upon questions as to contemporaneous acts, which are not applicable to contracts for repurchase of annuities. In this case no conveyance was proved to have been tendered or prepared, nor is it ascertained to whom the transfer by Joy was to be executed.

If the notices for repurchasing the annuities had been regularly given, they had been waived and abandoned, and rendered of no effect, by the settlement of accounts which took place between William Colhoun and the Appellant George Joy, in the month of April, 1824, and the letters written by William Colhoun on the 3d of April, 1824, and by the indenture of assignment of the 6th of April, 1824, executed by William Colhoun; in which accounts, letters, and assignment, William Colhoun treated the notices as void, and the annuities as subsisting and continuing annuities.

Even if the annuities did cease and determine on the 5th of May, 1824, the Appellant George Joy is entitled to interest on the two sums of 2000*l.*, and 2000*l.*, the purchase-monies of the said annuities, from the said 5th of May, 1824, to the time of the payment thereof; Wyrley Birch having ever since the 5th of May, 1824, been in possession or in the receipt of the rents and profits of the estates, upon which the annuities are charged, and having also been entitled under the agree-

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* 10 East, 101.

† 7 Tau. 314.

‡ 1 Marsh, 412.

§ 6 Barn. & C. 506.

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ments between him and the said William Colhoun to retain in his hands a sufficient part of the purchase-money of the estates, to satisfy the incumbrances thereon, including the annuities.

The Appellant George Joy is also entitled, according to the terms of the grants of the annuities, to be repaid, together with the purchase-moneys of the said annuities, and the arrears thereof, all the reasonable charges and expenses incurred by him up to the 5th of May, 1824, in recovering the payment of the said annuities.

The Appellant George Joy, having by the evidence adduced by him in the cause, proved the due execution by William Colhoun of the indenture of assignment of the 6th of April, 1824, whereby William Colhoun charged the purchase-money due to him from Wyrley Birch, with the payment to the Appellant George Joy, of the sums mentioned in the said indenture, the Appellant George Joy was entitled, on the hearing of the cause, to have it referred to the master to inquire, and state to the Court, what were the incumbrances affecting the purchase-money, and what was then due for principal and interest upon such incumbrances.

For the Respondents, Mr. *Wigram* and Mr. *Flather*.

In equity a purchaser is entitled to all the privileges and advantages of the legal owner of the estate, from the time when, by the terms of the agreement, he is entitled to the beneficial interest; and therefore, in the month of April, 1823, and long previously, the Respondent Wyrley Birch was entitled to the benefit of the covenant to repurchase the annuities contained in the annuity deeds.

The notice of the 16th of April, 1823, for the repurchase of the annuities is admitted by the answer, and it is in strict compliance with the terms of the condition of repurchase contained in the annuity deed; and it was not competent for the Appellant George Joy, after the receipt of such notice, to evade the tender of the purchase-money, by absenting himself from his dwelling-house at the time when, by the notice, the tender was to be made.

Notice for the repurchase of the annuities having been given by William Colhoun, the benefit of such notice belonged of right to the Respondent Wyrley Birch, as the purchaser of all Mr. Colhoun's interest in the estate; and therefore Mr. Colhoun had no power or authority to recal such notice, and by that means to continue the annuities a charge upon the estate previously sold by him, or to do any act to the prejudice of the interest of the Respondent Wyrley Birch in the estate purchased.

The claim of interest was not well founded. After the right of Birch under the agreement had vested Colhoun could not, by any contract with Joy, alter, or affect the rights of Birch. The conduct of the Appellant George Joy was the sole occasion of the delay in the completion of the repurchase. The annuity was satisfied at law by the tender, and the annuitant could not by his delay continue his right to the annuity contrary to the provision of the deed; the purchase-money was not only ready at the time when the Appellant George Joy ought to have accepted it, but the Respondent has since been exposed to the loss and inconvenience arising from his liability to be

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called upon at any hour for so large a sum as 4000*l.*, which, therefore, he has been compelled to keep ready for that purpose ever since. This is a hardship to which he ought not to have been subjected. There is no contract for interest, and as the annuities were never conveyed to the Respondent Wyrley Birch, he had not the power to enforce payment of them: the estate itself has not produced more than sufficient to satisfy prior charges thereon, and more than the whole of the purchase-money has been applied in paying off the incumbrances on the estate. Interest on a mortgage ceases after notice and tender made and refused; *Austen v. Dodwell*, 1 *Eq. Ca. Abri.* 318. *Lutton v. Rodd*, 2 *Ch. Ca.* 206. *Manning v. Burges*, 1 *Ch. Ca.* 29, and *Garforth v. Bradley*, 2 *Ves. sen.* 678, which is an exception to the rule. Nor is it necessary for the Plaintiff to prove that the money was ready and no use made of it. The cases cited to prove that doctrine, *Gyles v. Hall* and *Lutton v. Rodd*, by no means prove it. The first only shews that where the mortgagee proves that the money has not been lying dead, he will be entitled to interest. In the second the decree is that interest is not to be paid.*

The indenture of the 6th of April, 1824, bears internal evidence of being the act of a mind at that time incapable of business, or of the exercise of undue influence on the part of the Appellant George Joy. William Colhoun was at the time of the execution of the deed of the age of seventy-five years, and was separated from his friends and pro-

* It is said in the Report that it was so decreed, but the Plaintiff ought to make oath that the money was kept, and no profit made of it. See 2 *Sugd. V. & P.* 2, 9th ed.; *Powell, Mortg.* 6th ed. 935.

fessional advisers. The object of the Appellant George Joy, in obtaining that deed, was to increase his charge upon the estate at the expense of the Respondent Wyrley Birch, although nothing was justly due to him beyond his original claim.

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The Earl of Devon.—My Lords, this case of Joy and Birch is an Appeal from the Court of Chancery, in which Joy the Appellant, who was the Defendant in the Court below, complains of a judgment as it affects him, given by the Vice-Chancellor and affirmed by the late Lord Chancellor Brougham. This case was heard here on two days before my noble and learned friend, who had the assistance of the Lord Chancellor of Ireland and my Lord Lyndhurst. I was in hopes that both might have been here to-day, but they have given their attention to this case, and the House have had the advantage of hearing what their opinions are; but circumstances making it inconvenient for me to come at an early day again, my noble and learned friend on the Woolsack has permitted me to take this opportunity of stating what has occurred to me in this case; and without therefore venturing to move any judgment until the opinions of the other Lords who attended upon the argument have been offered to the House, I will now take the liberty of stating to your Lordships what has occurred to me upon a careful consideration of the case and attention to the arguments.

This was a bill filed by Mr. Birch, against Mr. Colhoun and Mr. Joy, and some other formal Defendants. The circumstances of the case were shortly these:—Mr. Birch contracts in 1812 to purchase from Mr. Colhoun a certain real estate for a

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sum of money somewhere about 90,000*l.*, and by that agreement Mr. Colhoun undertakes to convey the estate to him free from incumbrances. Birch shortly afterwards ascertains that among other incumbrances of which he was not in the first instance aware, there are two annuities charged upon the estate, which were created by deeds executed in the month of March, 1800, and the month of May, 1800. Upon discovering those two annuities, a second agreement is entered into between Birch and Colhoun, and that agreement provides for the discharge of certain incumbrances therein mentioned, including certain annuities; but takes no notice of the annuities granted to Joy, otherwise than that it provides in case of Birch being called on to pay those annuities for the manner in which he should stand creditor in respect of what he should so pay. That agreement does not take any notice with respect to the repurchase of these annuities. Various transactions then take place, and at last it ends in Birch filing a bill against Colhoun and Joy, calling for a specific performance of the agreement for the sale of the estate, and calling upon Joy to reassign the term by which the annuities were secured, alleging that under the covenant for that purpose contained in the annuity deed, a proper notice had been given to Joy of an intention to repurchase; and that circumstances had taken place which amounted or were equivalent to the payment to Joy, of the consideration money only of those annuities, and consequently the annuities had ceased, and that Joy was bound to reassign the annuities to the purchaser Birch. Answers are put in; no evidence is examined on the part of Birch, but several witnesses are exa-

mined on the part of Joy. A decree is then made by the Vice-Chancellor, the effect of which decree is to declare that the annuities, in consequence of what had passed, had actually ceased on a given day, namely, on the 5th of May, 1824; and the decree uses this expression, which it is important to notice, because upon that, I presume, the substance of the decree was founded, in which, however, I am under the necessity of saying that I cannot in any degree concur. The decree declared, "that the annuities of 300*l.* and 300*l.* in the pleadings mentioned, ceased and determined on the 5th day of May, 1824, when the notices to repurchase the said annuities, stated in such decree to have been admitted by the Appellant George Joy, by his answer to the original bill, to have been given by the said William Colhoun to the Appellant George Joy, expired." Upon this point, the question which your Lordships have to decide mainly turned, namely, whether there was such a compliance with the terms for repurchase contained in the annuity deeds as to justify the Court in saying, that the annuities did in point of fact expire, or are to be treated as having expired in May, 1824.

Now, with respect to this point, the facts appear to be of this nature. The bill alleges a letter of attorney given by Colhoun to Mr. Coke and Hanrott, making them his attornies to do certain things; and in the course of the arguments at the bar, a good deal was said with respect to the particular wording of that letter of attorney, and it was contended that the general words there used would entitle them to give the notice which is contained or referred to in these pleadings.

Under that letter of attorney, Coke and Hanrott

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signed an instrument, being a notice of intention to repurchase the annuity at the expiration of twelve months from the time of serving the notice; and the first question then would be, whether that was such a notice as entitled Birch either in his own name, or making use of the name of Colhoun, to pay the money, and consequently to call for a re-assignment of the annuity; and another very important question is, whether supposing the notice to be good, any thing was done which amounted to an intention to pay, or can be taken as equivalent to payment.

To take the last question first, which perhaps is the most convenient way—I confess I cannot see upon what ground the House can judicially say, that that which took place (admitting it all to be as it is stated on the part of Birch) amounted to any thing like a payment, or what can be held equivalent to payment. I do not mean to involve the question in the technicalities of the law with respect to tender; but in order to make it payment, something ought to be done which shows that the individual to whom the money was to be paid, had distinct notice of the intention to pay at a certain time and place, and that it was his default that he did not receive the money; that I take to be the principle and the only principle upon which we could hold an offer of payment to amount to payment. I confess, I am of opinion, that nothing appears on these pleadings, certainly nothing is admitted in the answer, which justifies that conclusion, and consequently that we must say, that the consideration money for the repurchase of the annuities was not paid. The result of that opinion, if we went no further, would be that the annuities are now subsisting annuities, and so far, I think, we must

all concur. My opinion certainly is, that the annuities are now subsisting annuities, and that nothing equivalent to repayment has been done.

Then comes the question, whether, admitting that repayment has not been made, such a notice has been given as would entitle the party now to make the payment. If this House should be of that opinion, the result might possibly be to make some difference in the order which the House may make; the result may possibly be that the party would be at liberty now to make payment in virtue of the notice so given.

With respect then to the notice, I certainly during a great part of the argument was rather disposed to take that view of the case; but upon looking more minutely and accurately into the pleadings and evidence, and what Mr. Joy says in respect to this point, I cannot concur in that assumption in the decree that Joy admitted the notice in such sense, that effect ought to be given to it as an admission. What he says with respect to that notice, is accompanied and qualified by a distinct denial of any authority in the parties so to do; but what I think is of still more importance, whether they had a right to give that notice or not, it appears all through that it is professed to be given as the notice of Colhoun. Now, if it is given as the notice of Colhoun, the only piece of evidence that connects Colhoun with any knowledge of it at all—(indeed whether he was cognizant of it or not, we have no evidence in the cause) is that before the time expired at which that notice was to be acted on, he expressed his desire and intention that it should not be acted upon, but that another course should be taken—another course not at all unreason-

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able or unnatural, because, although Birch unquestionably had a right to have the estate free from incumbrance, it does not follow that he had a right to take that particular mode, and that particular mode only, of getting a reassignment of the term. I am therefore further of opinion, that that notice cannot be treated as a notice upon which payment even now can be made. The result must be in that view of the case (and that, in fact, is the whole of the case)—the result must be, that the decree must be reversed so far as respects Mr. Joy. Mr. Colhoun is not a party to the appeal; neither he nor any body who represents him appeal. But speaking of my own individual opinion (in the substance of which I hope my noble and learned friends concur), I feel bound to say, that I cannot think this decree right, and therefore that it ought to be reversed; and I do not see how any thing short of a reversal of the decree *in toto* will answer the justice of the case, except this—that there is a complaint in the appeal that the decree does not direct any account to be taken of the purchase-money. So far I am disposed to think that the decree is right. I do not think upon these pleadings, any account of the purchase-money ought to have been directed. I merely throw that out because it will affect the form of the order. In point of form, if the House should concur in the view I have taken, and think that the decree should be reversed, then the costs paid (if they should have been paid) under the Lord Chancellor's order will be repaid.

*Lord Lyndhurst.** — The point upon which I

* His Lordship came into the House while the Earl of Devon was speaking.

concur in the opinion that has been pronounced by my noble and learned friend is this, that I do not think those circumstances which are admitted in the answer of Mr. Joy are sufficient to extinguish the annuity, without saying any thing as to whether or not the power of attorney, executed as it was for the purpose of giving notice to redeem the annuities, was sufficient for that purpose: the service of that notice was, in point of law, a regular service; but after the notice had been served, then, at the expiration of the notice, it appears according to the admission in Mr. Joy's answer (and there is no evidence in the cause except the answer)—it appears by the admission in the answer that Mr. Tooke and, I think, Mr. Syms attended at the house of Mr. Joy, there being no evidence whatever to show where Mr. Joy was at that time, for the purpose of tendering the money, and attended also for the purpose of tendering a deed of transfer for Mr. Joy to execute; and Mr. Joy not being at home at the time, or the servant stating that he was not at home, they left the notice that is set out in the bill, and which notice is also admitted by Mr. Joy to have been left at his dwelling-house at the time in question.

Now it appears to me, having, at various times during the argument, and from that time to the present, turned my mind to it, and considering what was urged by Mr. Wigram, and the cases which he has cited, I am compelled to come to the conclusion, from which I have never in fact varied, that what has been done is not operative in itself to extinguish the annuities; and I beg leave therefore to offer my humble opinion to your Lordships, founded on that view and that alone, that

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the circumstances so stated and so admitted by the answer of Mr. Joy, with no other evidence in the cause, are not sufficient to have the effect of extinguishing the annuities that were granted by Mr. Colhoun to Mr. Joy. It does not amount to that repurchase which alone can support the decree which has been pronounced by the Court below.

The Lord Chancellor. — My Lords, it is a great satisfaction to me that the parties to this appeal have had the benefit of the consideration of the noble and learned Lords who have now expressed their opinions, and also of my noble and learned friend the Lord Chancellor of Ireland, who attended throughout the whole of the discussion, and has authorised me to say that he entirely concurs in the opinions expressed in this House today. My noble and learned friend, the Lord Chancellor of Ireland, has also desired that I would state that, in addition to the other reasons which might influence the judgment in this case, he entertains very great doubts whether, under the circumstances in which these parties were placed, it was competent to Mr. Birch to call upon Mr. Colhoun to exonerate the estate at the expense of repaying the whole of the 4000*l.* after two lives had expired, and under the circumstances affecting the parties as they existed when the notice was given.

The object of this suit was to enforce a right of repurchase; the right of repurchase being contained in the terms of the deed in these words: “ That if Colhoun should be desirous to repurchase
“ and buy up the said annuity, yearly rent charge,
“ or annual sum of 300*l.*, and should give to the

“ said George Joy, his executors, administrators
 “ or assigns, twelve calendar months’ notice there-
 “ of in writing, then the said George Joy, his ex-
 “ ecutors, administrators and assigns, would at the
 “ end of twelve calendar months, for which such
 “ notice should be given, on receiving all arrear
 “ of the said annuity, accept and take the sum of
 “ 2000*l.* in full for the repurchasing thereof, and
 “ upon payment thereof would, at the proper costs of
 “ William Colhoun, release and surrender the said
 “ several securities for the same to Mr. Colhoun.”

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Now, it is a well-established rule that under a clause of repurchase of this description, being for the purpose of determining an interest, it is required to be strictly complied with. That doctrine which was laid down in *Barrel v. Sabine*, 1 Vernon, 268, is confirmed by the case of *Ensworth v. Griffith*, in this House, in the fifth volume of Brown’s Parliamentary Cases, 184; and it is further acted on in the case of *Davis and Thomas*, before the late Master of the Rolls, in 1 *Russell and Mylne*, 506. In the last case Sir John Leach expresses himself in these words: — “ Where there is no stipulation of
 “ forfeiture but a privilege conferred, provided
 “ money be paid within a certain time, the party
 “ claiming the privilege must show that the mo-
 “ ney was paid accordingly.” And the language of the Court in *Barrel v. Sabine* is, that where there is a sale with a clause for a repurchase upon payment of the purchase-money, the time ought to be precisely observed. It was therefore necessary for the party claiming the benefit of this repurchase (I am now supposing Colhoun to be the party claiming the benefit of the repurchase) to comply strictly with the terms of the

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proviso. He was bound therefore to give the regular notice, and, at the expiration of the regular notice, he was bound to pay, unless the payment was prevented by the situation of the party who received the notice. He was bound, therefore, either to show that he paid, or did that which, in law, would be equivalent to payment.

Now if you look to the terms in which these transactions are stated in the bill, and the way in which they are admitted in the answer (that being the only evidence on which the decree proceeded, there being no other evidence in the cause on the part of Birch), your Lordships cannot, I think, fail to come to the conclusion that there is a great want of all those requisites which would entitle the party seeking the benefit of the repurchase of these annuities to put himself in the situation in which, by his contract, he was bound to place himself. The bill alleges, "That all attempts of Birch " to repurchase the said annuities proving unsuccessful, Birch, being desirous of exonerating the " estates from the said annuities, requested Colhoun, in performance of his said agreement, to " give Joy such notice as was required by the said " annuity deeds, to enable him, Colhoun or Birch, " in his place, to repurchase the said annuities, " and that such notice was accordingly reduced " into writing and duly delivered to Joy on behalf " of Colhoun, on the 16th of April, 1823." The admission in the answer, on the subject of that notice, is in these terms: — " And this Defendant, " further answering, says, he has been informed by " the said William Colhoun and believes that the " Plaintiff did not request the said William Colhoun to give to this Defendant such notice as in

“ the said bill in that behalf mentioned, and Defendant admits it to be true, that a notice signed William Colhoun, by his attorney, was served on the Defendant, at or about the time in the bill mentioned.” It does not refer to the bill for the purpose of adopting the statement of the notice in the way it is alleged in the bill. It merely says that a notice, not identifying any particular notice, or saying any thing more on the subject of the notice, than that a notice, signed William Colhoun, by his two attorneys, was served on him at the time in the bill mentioned. The next allegation relates to what was done on the expiration of the term specified in that notice ; and for that purpose the bill states, “ That pursuant to such notice, and on the 5th May 1824, being the day for that purpose mentioned in the said notice, Mr. Tooke, the solicitor for Birch and on his behalf, and Mr. Syms on behalf of the said Mr. Colhoun, went to the Appellant G. Joy’s residence, in New Ormond Street, for the purpose of tendering the sum of 4000*l.*, together with all arrears of the said annuities, and the costs and expenses incurred by the said Appellant George Joy, in recovering the payment of the consideration-money for the same, and also for the purpose of tendering the deeds of transfer of the said annuities for the execution of George Joy ; but Mr. Tooke and Mr. Syms were then informed that the said George Joy was from home and gone to Guernsey or Jersey ; and thereupon the said Mr. Tooke and Mr. Syms left at his the said George Joy’s house a written notice in the words or figures or to the purport and effect

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"following." It then sets out the notice that was left at the house.

Now what it was incumbent on the Plaintiff to prove was, not that the notice was left at the house, but it was incumbent on him to shew that he either did actually pay, or did that which the law considers as equivalent to payment, namely, that species of tender which would enable him to say that he had done all that it was incumbent on him to do to entitle himself to the benefit of his contract.

Now what the Defendant says (which is the only evidence in the cause) on that subject is in these terms: "And this Defendant says he admits "it to be true that a notice, signed William Colhoun, by his attornies Edward Coke and Philip Augustus Hanrott, was served on him, this Defendant, at or about the time in the said bill in that behalf mentioned; but this Defendant says he has always protested against the authority of the said E. Coke and P. A. Hanrott to interfere in the concerns of the said William Colhoun, he, this Defendant, having previously thereto received from the said William Colhoun an irrevocable power of attorney."

These circumstances are in no way entered into or brought before the Court of Chancery by the Plaintiff. Coupled with the admission of the notice, there is a statement in the answer that two persons acting as attornies for William Colhoun were the persons who gave the notice; and there is a statement that the Defendant always disputed the title of those persons, stating that he had from William Colhoun, on whose behalf these two persons professed to act, an irrevocable power of attorney at an early date.

The answer goes on thus : " And this Defendant
 " says that the said Edward Coke, in a letter to
 " this Defendant, dated on or about the 27th No-
 " vember, 1820, informed this Defendant that he
 " the said Edward Coke would not act under a
 " power of attorney, which Mr. Syms had un-
 " duly persuaded the said William Colhoun, with-
 " out the knowledge of the said Edward Coke, to
 " execute to him ; and the said Edward Coke in a
 " subsequent letter to him, this Defendant, dated
 " on or about the 16th of May, 1824, informed
 " this Defendant that he, the said Edward Coke,
 " considered this Defendant knew or was aware
 " that for years he, the said Edward Coke, had
 " not concerned himself with the affairs of the said
 " William Colhoun, neither should he then : and
 " this Defendant therefore believes that the signa-
 " ture of the said Edward Coke to such notice was
 " incautiously given or surreptitiously obtained ;
 " and the said William Colhoun informed this De-
 " fendant that he the said William Colhoun had
 " no knowledge of such notice, and had not given
 " instructions to the said Edward Coke and Philip
 " Augustus Hanrott, or either of them, to give the
 " same on his the said William Colhoun's behalf."
 Then the " Defendant further says that after the
 " said notice had been so given, and before the
 " time mentioned therein had expired, the said
 " William Colhoun had settled his accounts with
 " this Defendant : " And this Defendant, further
 answering, says " that he is informed and be-
 " lieves" (this is the passage as to the transaction
 which is alleged by the Plaintiff to be equivalent
 to a tender) — " he is informed and believes that
 " pursuant to such notice, and at or about the

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“ time in the said bill in that behalf mentioned,
“ the said Mr. Tooke on the behalf of the Plaintiff,
“ and Mr. Syms pretending to act on the behalf
“ of the said William Colhoun, but, as this De-
“ fendant believes, without his knowledge or any
“ authority from him, did go to this Defendant’s
“ residence, in New Ormond Street, for the pur-
“ poses in the said bill mentioned. And this De-
“ fendant says he believes that the day in the said
“ bill, in that behalf mentioned, was the day in
“ the said notice mentioned for the repurchase of
“ the said annuities; and that the said Mr. Tooke
“ and Mr. Syms were then informed, as the fact was,
“ that this Defendant was then from home.” But
this Defendant says he does not know and cannot
set forth, as to his belief or otherwise, whether they
were informed that this Defendant was gone to
Guernsey or Jersey; this Defendant having been
previously at the island of Jersey, but having left
the same about three weeks before such inquiry
was made. And this Defendant further answering
says, he has understood, and believes it to be true,
that at the time in the said bill in that behalf men-
tioned, the said Mr. Tooke and Mr. Syms did leave
at the house of this Defendant such written notice
as in the said bill in that behalf mentioned; to
which said notice, when the same shall be pro-
duced to this Honorable Court, this Defendant
craves leave to refer: that is the only passage
in the answer which was read or relied on to
prove, on the part of the Plaintiff, the fact of his
having done that which was incumbent on him to
do for the purpose of placing himself in a situation
to determine the further payment of the annuity
to Mr. Joy.

Now the notice as stated in the bill (supposing that to be sufficiently admitted in the answer) is entirely silent as to any place at which the money was to be paid. The proviso in the deed is also silent as to the place where the money was to be paid, and the rule I apprehend to be very clearly established that, where that is the case, it is incumbent on the party giving the notice of the intention to repay, to specify the place at which he proposes to repay it. It was at one time a question whether where no place is stated, it is not necessary for the party to seek out the grantee and make a personal tender; but it has since been established that where there is no place mentioned, it is competent to him to specify in his notice a place, and the party then is bound to take notice of the place so specified. In the present instance there is no place mentioned; there is nothing to shew, even if all the circumstances took place which the Plaintiff alleges, that the house was a place where the Plaintiff was entitled to make the tender; there is a total failure of all evidence which amounts to any thing that may be considered as equivalent to payment; the fact admitted, and the only fact admitted, being, that the parties came to the house, and that the paper was left at the house: now, independently of that, there is a circumstance which is stated in the notice, which also throws an additional burthen upon the Plaintiff in making out his case, namely, that the payment must be accompanied by the execution of a deed. There is no statement, and therefore there can be no proof, that any previous steps had been taken to inform Mr. Joy of the nature or contents of the deeds which he was called upon to execute; and in

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the case of *W. and Smith*, 3 Atkyns, 89, Lord Hardwicke held that a mortgagee could not be called on to execute a reconveyance unless a copy had been left with him and sufficient time allowed to him to advise on it before the time appointed for payment. There is therefore throughout an absence of all those circumstances which could entitle Mr. Birch or Mr. Colhoun (supposing the transaction be considered as the transaction of Mr. Colhoun) to insist upon these annuities having determined by his having done that which, by the decree, he was bound to do, in order to determine the annuities, or that which could be considered as equivalent to it. There are various other grounds, independently of those which I have now stated, which might probably have led me to the same conclusion, if it had been necessary to advert to them, but being quite satisfied on the facts, as far as I have stated them, that no case is made out on the part of the Plaintiff to determine these annuities, it is unnecessary to make any observations on the other parts of the case.

That makes it necessary to consider what, under the existing state of circumstances, is proper to be done with this decree. The decree, as far as it affects Mr. Joy, is in these words: "And it was declared, that the annuities of 300*l*. and 300*l*. in the pleadings mentioned, ceased, and determined, on the 5th day of May, 1824, when the notices to repurchase the said annuities, stated in such decree to have been admitted by the Appellant George Joy, by his answer to the original bill, to have been given by the said William Colhoun to the Appellant George Joy, expired." And it was ordered, that it should be referred to the

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“ Master of the said Court, in rotation, to take an
 “ account of what remained due to the Appellant
 “ George Joy, for the arrears of the said annuities
 “ which accrued due up to the said 5th day of May,
 “ 1824. And it was declared, that the Respondent
 “ W. Birch was entitled to a reconveyance of the
 “ terms created for the security thereof, upon pay-
 “ ment to the Appellant George Joy of the sums of
 “ 2000*l.* and 2000*l.* for the purchase-money of the
 “ said annuities; and also upon payment to the Ap-
 “ pellant George Joy of what should be found due
 “ for such arrears thereof.” If your Lordships
 should concur in the view which I have ventured to
 suggest with regard to the merits of this decree, it
 is clear that all that part of the decree must be re-
 versed. If that part of the decree be reversed
 (and the other parts of the decree do not affect
 Mr. Joy; they merely affect the accounts as between
 the vendor and purchaser), the result will be that
 the estate purchased remains subject to these an-
 nuities of 300*l.* a year each. If, therefore, there
 had been nothing else to affect Mr. Joy’s interest,
 and he stands in the situation of an annuitant as to
 these two sums, the bill then would properly be
 dismissed as against him, because then the only
 subject-matter with respect to which he was made
 a party would fail, and he would be entitled to be
 entirely dismissed from the suit. But it is not his
 interest to be dismissed from the suit; and what
 appears in the cause makes it necessary that he
 should be continued a party to the cause, because,
 although what took place could not affect the in-
 terest of Birch, inasmuch as all the transactions
 were subsequent to the contract with Birch, which
 was in the year 1812, yet various transactions took

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place afterwards between Mr. Colhoun and Mr. Joy, which makes it necessary that Mr. Joy should remain a party to the cause, for the purpose of receiving out of the purchase-money which Mr. Birch may have to pay those sums, which, by his subsequent arrangement with Mr. Colhoun, he may or may not be entitled to receive. This being a question between co-defendants, it cannot be the subject of adjudication at the hearing, but it may very properly, I apprehend, be made the subject of inquiry; and it is absolutely necessary, that some inquiry should be made, in order that it may be ascertained what ought to be done with the purchase-money when the purchase-money is paid. It appears—(and that is a question which I do not further enter into than for the purpose of showing what the claims are, because, being a question between co-defendants, I apprehend your Lordships will be of opinion, that the proper course will be to leave all matters as between co-defendants as open as possible, but to put it in a train of inquiry by which the rights of the parties will be worked out)—it appears, however, in evidence, that in the year 1817, letters passed between Mr. Joy and Mr. Colhoun, which, as it has been contended on the part of Mr. Joy, entitle him to interest on the arrears of his annuity. It also appears, that in the year 1824, a deed was executed by which at all events (that deed not being impeached as between Mr. Colhoun and Mr. Joy), Mr. Joy claims the benefit of arrears of interest then existing upon his annuities. To what extent or in what way Mr. Joy may be able, as against the purchase-money coming from Colhoun, to work out these several claims, is a matter with which the decree at the hearing ought not, I

apprehend, otherwise to have interfered than by referring it to the Master, as between those co-defendants, to inquire whether Mr. Joy had any, and what lien or claim on the purchase-money, which would under the contract be paid by Mr. Birch to Mr. Colhoun. That is a matter with which Mr. Birch can have nothing to do, because it can only affect so much of the purchase-money as would otherwise be coming to Mr. Colhoun.

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I should therefore submit to your Lordships' consideration, whether the proper course to be adopted would not be to reverse so much of the decree as I have already stated as affects the interest of Mr. Joy, and then direct a reference to the Master to inquire whether Mr. Joy has any and what lien upon or claim to any portion of the purchase-money, which would be payable by Mr. Birch to Mr. Colhoun.

The only other part of the case, as affecting the interest of Mr. Joy, which it is necessary for me to call to your Lordships' attention, appears to be the decree upon the appeal to the Lord Chancellor having directed Mr. Joy to pay the costs. It necessarily follows, if your Lordships adopt the opinion which I have formed on this subject, that your Lordships should order the repayment of those costs, which will then bring back the parties to the situation in which they would have stood, if the decree which I have ventured to suggest had been pronounced at the time of the original hearing.

Under these circumstances, I move your Lordships that this decree be reversed to the extent which I have stated, and that, in lieu of that part, there be substituted the inquiry which I have suggested.

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It is ordered and adjudged by the Lords Spiritual and Temporal in parliament assembled;

That so much of the said decree of the twenty-third day of February, 1830, complained of in the said appeal, as declares that the said annuities of 300*l.* and 300*l.* in the pleadings mentioned ceased and determined on the fifth day of May, 1824, when the notice to repurchase the said annuities (stated in such decree to have been) admitted by the Defendant George Joy, by his answer to the original bill, to have been given by the Defendant William Colhoun to the said George Joy, expired; and as orders that it be referred to the Master of the Court of Chancery, in rotation, to take an account of what remained due to the said George Joy from the arrears of the said annuities which accrued due up to the said fifth day of May, 1824; and as declares that the Plaintiff Wyrley Birch was entitled to a reconveyance of the terms created for the security thereof, upon payment to the said George Joy of the sums of 2000*l.* and 2000*l.* for the purchase money of the annuities, and also upon payment to the said George Joy of what should be found due for such arrears thereof, — be, and the same is hereby reversed.

And it is further ordered and adjudged, that the said order of the tenth day of August, 1831, whereby it was ordered that so much of the said decree should be affirmed with costs, to be taxed by the Master, and that the 20*l.* which had been deposited with the Registrar, on setting down the petition of appeal, should be paid to the solicitor of the Plaintiff Wyrley Birch in part of such costs, be, and the same is hereby also reversed; and it is further ordered, that the amount of costs paid in

pursuance of such order by the said George Joy to the said Wyrley Birch, and also the said sum of 20 $\text{\textit{L}}$., be repaid by the said Wyrley Birch to the said George Joy.

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And it is further ordered, that so much of the bill as prayed that it might be declared that the two several annuities of 300 $\text{\textit{L}}$. and 300 $\text{\textit{L}}$., chargeable on the estate thereinbefore named as thereinbefore mentioned, ceased and determined on the fifth day of May, 1824, and that an account might be taken by and under the direction and decree of the said Court of Chancery of the arrears of the said annuities respectively which accrued due on or prior to the fifth day of May, 1824, and of the costs and expences reasonably incurred by the Defendant George Joy in respect of such arrears; and that upon payment of what should be found due, together with what should be due on the two several sums of 2000 $\text{\textit{L}}$. and 2000 $\text{\textit{L}}$. to the said George Joy, and which the said Wyrley Birch thereby offered to pay the Defendants, George Joy, Henry Hall Joy, and Elizabeth Joy, might be decreed to make and execute all deeds and do all such acts as might be necessary to reconvey, transfer, and assign the said two annuities and all securities for the same to the said Wyrley Birch; and that in the meantime, the said George Joy, Henry Hall Joy, and Elizabeth Joy, might be restrained by the order and injunction of the said Court of Chancery from commencing or prosecuting any action or actions at law, or taking out execution or any proceedings at law against the said Wyrley Birch on the said estates, or any of them, or the tenants thereof, for compelling payment of the said annuities, or either of them, or any arrears thereof,

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be, and the same is hereby dismissed with costs to be paid by the Plaintiff Wyrley Birch to the said George Joy, Henry Hall Joy, and Elizabeth Joy.

And it is further ordered, that it be referred to one of the Masters of the said Court of Chancery to enquire whether the Petitioner George Joy has any and what claim to or lien upon any part of the purchase-money to be paid by the said Plaintiff Wyrley Birch to the Defendant William Colhoun ; and that the said Master do state the particulars of any such claim or lien, and the amount thereof and of what the same consists, and how the same arose : and it is further ordered, that after the Master shall have made his report thereon, the said Court of Chancery do proceed further in the said cause as shall be just and consistent with this judgment.

JOHN WILLIAM BIRCH,
Dep. Cler. Parliamentor.

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(COURT OF CHANCERY.)

WILLIAM HOLMES, - - *Appellant;*

THOMAS HENTY, JEREMIAH LEAR,	} <i>Respondents.</i>
JOHN LEAR, and ROBT. FRENCH,	
and also JAMES HOPKINS, JOHN	
COLE TOMPKINS, and HENRY	
JAMES PARSONS, - -	

By the statutes, relating to Savings' Banks in operation before July, 1828, the increase of the fund or surplus, after paying the expenses of management, and the interest upon the deposits, was directed to be distributed among, or for the benefit of the depositors. By the Act 9 G. 4. c. 92., which was passed in July, 1828, to consolidate and amend the laws relating to Savings' Banks, it is enacted (s. 22.), that, within six weeks after the 20th November, 1828, the trustees, &c. shall ascertain the amount of the increased funds up to that date; and, after retaining so much thereof as might be necessary for future management, should appropriate the same in manner provided for by their respective rules and regulations made before the passing of the act; or, in the event of no provision having been made by such rules and regulations, then in such manner as the trustees, or the major part of them, assembled at any general meeting convened according to the rules, &c. shall think fit and proper.

The Arundel Savings' Bank was established in 1818; and, in pursuance of this enactment, the increased stock or fund of that bank, up to the 20th November, 1828, was ascertained and found to amount to 742*l.* 15*s.* 11*d.* By the second of the rules, established at the first institution of the society, it was provided that no trustee, nor any person having any control

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in the management of the institution, (except the actuary) should derive any benefit from any deposit made therein.

The trustees were owners of property in the town and county, and liable to be rated for the repairs of the bridge at Arundel. The Appellant was Bridge-Warden in 1828.

At a meeting of the trustees on the 11th December, 1828, it was resolved, that of the increased stock "the sum of 100*l.* be returned for the future purposes or management of the bank; that the sum of 50*l.* be paid for arrears of rent and firing to the fund of Arundel school; and that the remainder, 592*l.* 15*s.* 11*d.* be paid over to W. Holmes (the Appellant), and three other trustees, for the purpose of paying the expense incident to the widening the public bridge over the river at Arundel, the same being narrow and dangerous, and accidents having arisen thereupon; and, in case counsel be of opinion that the trustees are not so authorized to dispose of the money, that the same be disposed of in such manner as the trustees, or the major part of them present, at the annual meeting in November, 1829, shall order—that a case for the opinion of counsel be prepared," &c. A case was prepared accordingly, and the opinion of counsel being adverse to the appropriation, an amended case was submitted to him, which produced a favourable opinion.

In the mean time another case was submitted to counsel by those who opposed the appropriation, and an opinion declaring it to be illegal was produced by the opponents at a meeting in December, 1829, and the Appellant and the other trustees were required to rescind the resolution, and to restore the fund.

On the 1st March, 1831, a bill was filed by some of the trustees against the Appellant and the other trustees, into whose names the fund had been transferred, to restrain the application, &c. The answer contended for the legality of the resolution, and stated that part of the fund had been applied to the expense of widening the bridge; and, upon a motion made for the payment of the money into Court, the Appellant filed an affidavit, in which he stated that, on the 9th of March, 1831, he applied the residue of the fund, which had been transferred to him by the other Defendants, to the payment of the expenses of widening the bridge. Upon this motion it was ordered that the whole fund should be paid into court; and, upon the hearing, it was decreed that the Defendants had been guilty of a breach of trust, and were personally responsible for the misapplication of the fund, and were

charged with the costs of the suit. The order and decree were affirmed, with costs, upon appeal by one of the Defendants, the others not joining in the appeal.

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IN May, 1818, a Savings' Bank was established in Arundel under the name of the Arundel Provident Bank. The forms prescribed by the different acts of parliament for the regulation of Savings' Banks were from time to time duly complied with, and the business of the institution was conducted in the manner usual in Savings' Banks. The trustees, in whom the property belonging to the association was vested, were upwards of fifty in number.

On the 28th of July, 1828, the Royal Assent was given to an act of parliament (9 Geo. IV. c. 92.), intituled "An Act to consolidate and amend the Laws relating to Savings' Banks." The 22d section of the act ordered "That within six weeks after the 20th day of November, 1828, the trustees and managers of the different Savings' Banks already established in England and Ireland shall ascertain the amount of the increased stock or funds of their respective banks up to the said 20th day of November, 1828, and shall, as soon afterwards as conveniently can be, after retaining so much thereof as may be necessary for or towards the future purposes and management of the said Savings' Banks respectively, appropriate the same in the manner provided for by their respective rules and regulations made before the passing of this act; or in the event of no provision having been made by such rules and regulations, then in such manner as the trustees

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“ or managers, or the major part of them, assembled
 “ at any general meeting to be convened according
 “ to the respective rules and regulations of such
 “ Savings’ Banks, shall think fit and proper, any-
 “ thing herein contained to the contrary notwith-
 “ standing.”

In pursuance of this enactment the increased stock or fund of the Arundel Provident Bank, up to the 20th of November, 1828, was ascertained, and was found to amount to 742*l.* 15*s.* 11*d.*

It was conceived that the rules and regulations of the Bank did not contain any direction as to the mode of applying this surplus, and on the 11th of December, 1828, at a meeting which was called a general meeting of the trustees, the Respondent J. C. Tompkins proposed, and the Appellant William Holmes seconded, a resolution for the appropriation of the increased stock. The resolution was, “ That the sum of 100*l.* be retained for or to-
 “ wards the future purposes and management of
 “ this Bank; that the sum of 50*l.* be paid for arrears
 “ of rent and firing to the fund of the Arundel
 “ School; that the remaining sum of 592*l.* 15*s.* 11*d.*
 “ be paid over to the Reverend J. H. Parsons,
 “ William Holmes, James Hopkins, and John Cole
 “ Tompkins, for the purpose of paying the expense
 “ incident to the widening of the public bridge
 “ over the river at Arundel, the same being now
 “ both narrow and dangerous, accidents having
 “ arisen thereon; and that in case counsel be of
 “ opinion that the trustees are not so authorized to
 “ dispose of the money, that the same be disposed
 “ of in such manner as the trustees and managers
 “ present, or the major part of them, at the annual
 “ meeting in the month of November, 1829, shall

“ order; that a case for the opinion of counsel be prepared and submitted to the standing committee to be settled by them; that the treasurer do withdraw the whole of the surplus sum of 742*l.* 15*s.* 11*d.* and do dispose of it according to the preceding resolution.” This resolution was opposed by some of the trustees present at the meeting, but a majority of them assented to it; the custom being for all who were present to sign such resolutions as were adopted, whether they approved of them or not. This resolution was signed by the eight trustees who were present, though some of them had voted against it. No notice had been given that the mode of applying the surplus fund was to be taken into consideration at that meeting.

A case, settled by the Committee, was accordingly submitted to counsel, who gave his opinion that the proposed application of the increased stock would not be according to law. Whereupon an additional or amended case was afterwards prepared by Mr. Holmes, who was an attorney and solicitor, there being no proof that it was settled by the Committee, and he obtained from the same counsel, in November, 1829, an opinion, that the trustees might be justified in applying the fund in the manner proposed. This additional or amended case was not settled by the committee.

In the mean time the 642*l.* 15*s.* 11*d.* had been paid over to the Defendants; and an account having been rendered by the Defendants, or some of them, to the Commissioners for the Reduction of the National Debt, in which it appeared that 642*l.* 15*s.* 6*d.*, part of the increased stock or fund, had been appropriated, in conformity to the provision of the 9 Geo. IV. c. 92., the Commissioners,

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by their secretary, inquired whether the sum had been paid to the depositors in cash, or only placed to their credit. The answer did not disclose how the money had been appropriated, but merely stated that it had neither been placed to their credit, nor paid to them in cash.

In December, 1829, one of the Respondents first heard of the intended appropriation of the surplus fund; and at a meeting of the trustees, held on the 21st of December, 1829, the Respondent, Mr. Henty, remonstrated strongly against it. He contended, that if the fund was to be touched, it ought to be applied to some purpose substantially beneficial to the institution or the depositors; and, as one of the many modes in which it might be so applied, he suggested that it might be laid out in the purchase of premises for carrying on the business of the Bank. Not having succeeded in getting the resolution rescinded, he took the opinion of the barrister appointed for the purpose of the Savings' Banks by the Commissioners for the Reduction of the National Debt, and was advised by him that the application of the surplus fund was contrary to law.

The subject was again brought forward at a meeting held on the 20th of December, 1830; Mr. Henty produced a case which had been submitted by him to counsel, and read the opinion; and both he and Mr. Lear remonstrated earnestly against carrying into effect the resolution of the 11th of December, 1828, and proposed that, at least, another opinion of counsel should be taken. But a majority of the trustees present rejected his proposal.

On the 9th of March, 1831, the sum of 592*l.* 15*s.* 11*d.* was paid over by the other Defendants to

Mr. Holmes, for the purpose of defraying the expense of widening the bridge over the Arun. Mr. Holmes was at that time Bridge-warden, and the owner of considerable property in the neighbourhood.

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On the 1st of March, 1831, the Respondents filed their bill in the Court of Chancery against James Hopkins, William Holmes, John Cole Tompkins, and Henry James Parsons ; which, under an order of the 13th of May, was amended before answer. The bill contained the allegations before mentioned, stating more fully that in May, 1818, certain persons formed a society in Arundel, in the county of Sussex, for the purpose of maintaining and establishing an institution, in the nature of a bank, to receive deposits of money for the benefit of the persons depositing the same, conformably to the then existing law. That such society was named the Arundel Provident Bank, and was intended, and declared to be intended, for the encouragement of industry, economy, and independence, by receiving and affording a secure investment for such small sums of money as might be raised from the earnings of servants, mechanics, and others, of Arundel and its vicinity. That in order to encourage and promote the said institution, small deposits therein were made by a great number of persons of respectability and property in the neighbourhood, and that rules and regulations for the management of the said institution were duly formed from time to time ; and by the said rules and regulations the property and management of the said institution were vested in and intrusted to certain trustees, who always, or generally, were upwards of fifty in number. That at a general meeting of the trustees

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of the Arundel Provident Bank, held on the 27th day of November, 1828, it was resolved, that the rules and regulations thereafter mentioned should be the rules and regulations of the Arundel Provident Bank, in lieu of those at any time theretofore agreed upon; and that such amended rules and regulations should be thenceforth printed, and a copy thereof delivered to each trustee and depositor on application; and that among such rules and regulations were the following: — 1st. That the management of the institution should be vested in not less than twenty trustees, who shall have power to add to their number. 2d. No trustee, or other person having any control in the management of the said institution (except the actuary), shall derive any benefit from any deposit made therein. 3d. James Hopkins (the Respondent, and one of the Defendants to the said bill) is appointed treasurer. 7th. A committee of eleven trustees (any two of whom shall have power to act) shall be annually appointed at the first general meeting of the trustees after the 20th of November in each year; and the duty of that committee shall be, to superintend the accounts of the Bank, to report thereon yearly to the trustees, and to sign all orders on the investing of money in the Bank of England, and the drawing out the same; that they shall also be authorized and requested from time to time to report to the trustees their opinion on any plan or suggestions which may come under their notice, relative to the general management of the institution. 19th. That all sums received by the trustees be deposited with the treasurer the same day that they are received, and invested in the Bank of England, in the name of the Commissioners for the Reduction of the National Debt;

leaving such balance only in the hands of the treasurer, as may be deemed necessary to answer the exigencies of the institution. 33d. That the accounts of the Bank shall be made up and balanced to the 20th of November in every year, and a statement of such balanced accounts, attested by two of the committee, and countersigned by the actuary, shall be transmitted to the Commissioners for the Reduction of the National Debt, within six weeks from such 20th of November; that a duplicate of such statement, attested and countersigned as aforesaid, shall be exhibited in some conspicuous part of the Bank during the following year, and every depositor shall be entitled to a copy of such annual statement on demand. 35th. That no alteration shall be made in any of the foregoing rules and regulations, without a month's notice having been given to each trustee, by note from the actuary, that such alteration was intended to be proposed; and that no alteration shall be valid, unless made at a meeting where five or more trustees are present.

The bill further stated, that a transcript, on parchment, of the said rules and regulations was duly submitted to John Tidd Pratt, Esq., the barrister-at-law, appointed in that behalf by the Commissioners for the Reduction of the National Debt, who certified that they were in conformity to law and to the provisions of the Act 9 Geo. IV. c. 92., intituled "An Act to consolidate and amend the "Laws relating to Savings' Banks;" that the said transcript was duly deposited with and filed by the clerk of the peace of the county; that in 1824, and from that time down to the filing of the bill, the several Defendants had been and still were trustees of the said Savings' Bank; that James Hopkins in

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and since November, 1828, had been and then was the treasurer thereof; and that the other trustees of the said Savings' Bank were upwards of fifty in number, and were too numerous to be made parties to the suit; that the Respondents were, in 1824, and had ever since been, and then were, all of them, either trustees of or depositors in, or both trustees of and depositors in, the said Savings' Bank; and that, by the said rules and regulations, and also by the act of parliament before mentioned, all monies, effects, and securities for money belonging to the said institution, were, and were then vested in the trustees thereof for the time being, for the use and benefit of such institution, and the respective depositors therein, their respective executors and administrators, according to their respective claims and interest; that, shortly previous to the 20th of November, 1828, the trustees of the said Savings' Bank ascertained the amount of the increased stocks or funds of the said Bank up to the said 20th November, 1828, when it was found that the said increased stock or fund amounted or would amount to 742*l.* 15*s.* 11*d.*, or thereabouts; that the trustees of the said Savings' Bank were, and each of them was, trustees or trustee of the said increased stock or fund for the said Savings' Bank and for the depositors therein.

The bill further stated, that on the 13th of December, 1828, a meeting was held at Arundel, at which a few only of the trustees, and by no means a majority of their number, attended; and that the said Defendants procured a pretended resolution to be passed at such meeting, by which it was ordered that, after retaining 100*l.* towards the future expenses and management of the in-

stitution, 50*l.*, part of the increased stock, should be paid to the fund of the National or Free School of Arundel, and 592*l.* 15*s.* 11*d.*, being the residue of the said sum, should be paid to the said James Hopkins, William Holmes, John Cole Tompkins, and Henry James Parsons, for the purpose of paying the expenses of widening the public bridge over the river Arun at Arundel; that the said sums of 50*l.* and 592*l.* 15*s.* 11*d.* were accordingly paid over to the Defendants, and that they paid the sum of 50*l.* to the said National School; and that they threatened and intended to pay the said sum of 592*l.* 15*s.* 11*d.* in repairing and widening the said bridge, or otherwise improving the same; however, the last mentioned sum was still, at the time of filing the said bill, in their hands, or invested in stock in their names; that the Plaintiffs (Respondents) did not concur in or consent to the said pretended resolution and the proceedings consequent thereon, and that when they first heard of the same, which was not till a considerable time after it had been adopted, they were greatly astonished, and some of them, at the next meeting of trustees of the said institution, remonstrated with the Defendants against the impropriety of the said resolution and proceeding, and suggested that, if the increased stock was to be touched, the same ought to be applied to some purpose substantially beneficial to the said institution or to the depositors therein, and some of these Respondents suggested that the money might be expended in purchasing or erecting buildings for the carrying on the business of the said Bank, or as a bonus to and among such industrious labourers, servants, and mechanics, as were depositors therein;

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that from that time up to, and in December, 1830, the said remonstrances were frequently repeated by or on behalf of the Plaintiffs (Respondents), but the Defendants refused to pay any regard to any of the said remonstrances.

The bill further stated, that the Respondent, Thomas Henty, took the opinion of the barrister appointed for the purposes of the Savings' Bank Act by the Commissioners for the Reduction of the National Debt, as to the propriety of the proceeding, and was advised that the application of the sum of 50*l.* and the intended application of 59*2l.* 15*s.* 11*d.* were misapplications of the funds of the institution, and were contrary to law; that, at a meeting of the trustees of the said institution, held on or about the 20th day of December, 1830, the Respondents, Thomas Henty and Jeremiah Lear, produced and read in the presence of the Defendants the case submitted to the aforesaid barrister and his opinion thereon; and the Respondents protested against applying any part of the said increased stock towards widening or repairing the said bridge, but the said John Cole Tompkins used words to the effect following, that is to say, we (meaning the said Defendants) have got the money, and you (pointing to the said Respondents, Thomas Henty and Jeremiah Lear) may get it away from us if you can; that the Plaintiffs (Respondents) delayed instituting proceedings in the hope that the Defendants would not persist in misapplying the said monies, but that there was at the time of filing the bill no means of preventing the misapplication of the said monies except by the interposition of the Court of Chancery.

The bill charged that, though the business of the Bank had been carried on in a building belonging to the School, yet it was expressly agreed between the trustees and managers of the said Bank and the persons having the control of the property of the said School, that the business of the said Bank should be carried on in the building of the said School free of any expense; that the said bridge at Arundel is a great public thoroughfare, and that the expense of repairing it and keeping it in a proper state ought in law to be borne either by the corporation of Arundel or by the said corporation and the inhabitants of Arundel jointly, and that all the Defendants were respectively owners of property of considerable value in Arundel, which would be chargeable in respect of the expenses of repairing the said bridge; that all of them, except the said Henry James Parsons, were members of the corporation of Arundel, and William Holmes held the office of bridge-master of the said bridge, and had often declared that the inhabitants of Arundel were by law chargeable with the expense of widening the said bridge; that by misapplying the property of the said institution to repairing and improving the said bridge, they, the Defendants, would acquire a personal benefit to themselves; that the alleged meeting of trustees, at which the said resolution was passed, was not duly called, nor was due notice given thereof, or of its being intended to propose any such resolution touching the disposal of the increased fund; that if due notice of the said meeting and of the intended business thereof had been given, the Respondents, Thomas Henty and Jeremiah Lear, and many other of the trustees, would have attended and

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prevented the adoption of so improper a measure ; and that the alleged resolution was passed informally and irregularly, and was altogether invalid and contrary to the fundamental institution of the said society, and a violation of the trusts, which the trustees of the said society were bound to carry into effect.

The prayer of the bill was, that it might be declared that the Defendants were, at the filing of the bill, trustees of so much of the increased stocks or funds of the said Savings' Bank as had been so paid over to them or transferred into their names, or otherwise placed at their disposition for the use and benefit of such institution and the respective depositors therein ; and that the said Defendants had been guilty of a breach of trust in paying thereout the said sum of 50*l.* to the said National or Free School, and that the application of any part of the said increased stock, to the purpose of widening or otherwise repairing and improving the said bridge, would also be a breach of trust ; and that an account might be taken of all sums of money or stocks in the public funds, being part of or arising from parts of the said increased stocks or funds, which had been received by or transferred into the names of the Defendants, any or either of them, or any persons or person, for their or any of their use, or by their or any of their order, and of the interest or dividends with which they ought to be charged in respect of the said monies or stocks, and that the said Defendants might be decreed to pay what should be found due from them upon such account, either to the trustees of the said Savings' Bank, or as the said trustees should direct, or to the Commissioners for the reduction of the National

Debt, and that the said Defendants might be removed from being trustees of the said Savings' Bank, and that the said James Hopkins might be removed from being treasurer thereof and restrained from acting as such, and that the said Defendants might be ordered to pay to the Plaintiffs (Respondents) the costs of the suit, and in the mean time that the said Defendants might be restrained from applying the sum of 59*l.* 15*s.* 11*d.*, or any other part of the increased stock or funds of the said Savings' Bank, towards defraying the expences of widening or otherwise improving and repairing the said bridge at Arundel, or otherwise than for the special use and benefit of the said Savings' Bank or the depositors therein.

In 1831, James Hopkins, William Holmes, and John Cole Tompkins, filed their joint and several answers to the bill.

The Defendants by their answer, after admitting the formation and rules of the Bank and other matters as alleged in the bill, and particularly the Defendant William Holmes said that he having received a notice calling a general meeting of the trustees of the said Savings' Bank, on the 13th of November, 1828, attended at such meeting, and after much discussion respecting the then intended new rules and other matters, the manner in which the increased stock should be disposed of was talked about, and no specific plan of applying it was proposed by any one, but it was then mentioned by some of the trustees, and considered to be contrary to the act of parliament and the rules and regulations under which the said Savings' Bank was carried on, to distribute the said increased stock among the depositors, inasmuch as many of the

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trustees, being also depositors, would then have received benefit from such distribution; and the said Defendant William Holmes at such meeting said, that if no other trustee proposed any other plan for disposing of such increased stock, he would propose that the same should be applied towards widening Arundel Bridge, when the proper time for disposing of it arrived; but the Defendants said, that no actual proposal or resolution was made or passed respecting the said increased stock at the said meeting of the 13th November, 1828.

And the said William Holmes said, and the said other Defendants believed, that William Holmes, James Hopkins, and John Cole Tompkins, and also the said Henry James Parsons, attended at the said general meeting of the said trustees, which was held on the 27th of November, 1828, when again the manner in which the said increased stock should be disposed of was discussed, and no mode of disposing of the same was proposed or adopted, or any determination made or come to as to the said increased stock, further than that it should be disposed of at the next general meeting then to be held; and the Defendant William Holmes then said to several trustees, that he would propose at the next general meeting that one fourth part of the increased stock of the Bank should be retained for the future purposes of the Bank, and that the residue should be applied for widening the said bridge, or to such or the like effect.

The Defendants, by their answer, further said that it was at the said general meeting, holden on the said 27th of November, 1828, ordered that a general meeting should be summoned for Tuesday, the 11th of December then next; and that, in pursuance of such last-mentioned order, a general meet-

ing of the trustees of the said Bank was duly called by a written notice from the actuary of the Society; and that at the said meeting of the 11th of December, 1828, much discussion on many points took place, and particularly as to the disposal of the said surplus; and that it having been thereat proposed and unanimously agreed on that 100*l.* should be retained for the future purposes and management of the said Bank, and 50*l.* allowed for arrears of rent and firing to the said Arundel School, it was then, at the said meeting and after such discussion on the subject, proposed by the said John Cole Tompkins, and seconded by William Holmes, that, after retaining 100*l.* for the future purposes and management of the said Bank, and allowing 50*l.* for arrears of rent and firing to the said Arundel School, the surplus should be applied for the purpose of widening the said bridge at Arundel; and the said proposal, being, at the request of the said Mark Aloysius Tierney, one of the said trustees, who appeared to object thereto, put to the vote by the chairman, the same was carried by a majority of the trustees then present; and that, after the said proposition had been carried as aforesaid, the said Mark Aloysius Tierney having started a doubt whether the law would permit such a disposal of the money, the said Defendant William Holmes proposed that the opinion of some eminent counsel should be taken on the subject, and that in case counsel should be of opinion that such an appropriation of the money was not authorized, it should be disposed of at the next annual meeting by a majority of the trustees to be then present, and that in the mean time the money should be withdrawn and put into the names of trustees, which last-

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mentioned proposal was unanimously agreed to by all parties present; and ultimately it was, at the said meeting of the 11th of December, 1828, resolved (amongst other things not relating to the increased fund) to the effect already stated.

The Defendants by their answer further stated, that in pursuance of the resolutions so come to as aforesaid, a case and an amended or additional case were prepared on behalf of the trustees of the said institution, and laid before counsel for his opinion as to the proposed appropriation of the said surplus; and the said counsel was of opinion, that the same would be a proper appropriation thereof; and that, at the general meeting of the said institution, which was duly held on the 21st of December, 1829, the said case and additional case, together with the opinion of counsel thereon, were produced and read to the said meeting, when the Respondent Thomas Henty, who was present at the said meeting, expressed a wish for a further opinion, and induced the chairman to put the question to the vote, which was accordingly done; and that, out of all the trustees then present, (about fourteen in number, as the Defendants best recollected and believed,) the said Thomas Henty stood alone in his vote for such further opinion: and by their answer, the said Defendants said that they believed the said sum of 50*l.* had been paid to the fund of the said National School in the manner directed by and in pursuance of the said resolutions, and they admitted that the said sum of 59*2l.* 15*s.* 11*d.* had been paid into the hands of the said William Holmes, for the purpose of being applied by him, acting for himself as one of the said trustees, and as bridge-warden for Arundel Bridge, and on behalf of the said other

Defendants and the said Henry James Parsons, as such trustees for the purposes directed by and in pursuance of the said resolutions; and that the said William Holmes, so acting as aforesaid, had applied part, and did intend to apply the residue of the said sum of 592*l.* 15*s.* 11*d.* in widening the said bridge, and that the said sum was, subsequent to the meeting of the trustees on the 18th of December, 1830, paid to and received by the Defendant William Holmes, as bridge-warden of Arundel Bridge, for the purpose of applying it towards the widening of Arundel Bridge; and that he had expended divers sums of money, amounting to 150*l.* at least, towards carrying the said resolution into effect, and would in a short time expend upwards of the said sum of 592*l.* 15*s.* 11*d.*, and that he had contracted for and procured divers articles and materials for widening the same bridge on the credit of the said last-mentioned sum.

The defendants by their answer further said, they believed that the said Respondent Thomas Henty never attended any of the meetings of the Institution except those of the 13th of March, 1827, the 21st of December, 1829, the 13th of December, 1830, and the 20th of December, 1830, and that the said Respondent Jeremiah Lear did not attend any general meeting of the said Institution, from Michaelmas, 1827, until the said meeting of the 13th of December, 1830, when he attended with the said Respondent Thomas Henty, who then produced the case and opinion of Mr. Pratt, and that after such case and opinion had been read, the Defendant William Holmes stated, that the case was wrongly stated, and that the money was then disposed of, and must be applied for the purposes

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for which it was ordered, and that the trustees had then no control over it; however, after the said Defendant William Holmes had left the meeting, the Respondents Jeremiah Lear and Thomas Henty pressed for another general meeting of the trustees being called, in order to take the sense of the trustees as to taking another opinion of counsel, and that the Respondent Jeremiah Lear, in order to induce the trustees then present to acquiesce in such proposal, pledged himself, that in case the trustees at that meeting adopted such a proceeding, and the majority of the trustees who should assemble at the meeting to be so called should not agree with him to take the opinion of counsel, he (whatever his opinion might be) never would mention the subject again, or give any further trouble about it, or words to that effect; and that, in consequence of such requests and assurance, it was ultimately agreed on, at the meeting of the 13th of December, 1830, to call another general meeting on the 20th of the same month, for the purpose of determining whether or not any further opinion of counsel should be taken; and that a general meeting was accordingly called, and was held on the 20th day of December, 1830, when the question as to taking a further opinion was discussed, and the said Defendants, by their answer, said they believed that, with the exception of the said Respondents Thomas Henty and Jeremiah Lear, every trustee then present was against the said proposition, and it was finally resolved that no further opinion should be taken.

The Defendants by their answer admitted, that at the annual meeting in December, 1830, it was suggested by the Respondent Jeremiah Lear, that the

money might be expended in purchasing or erecting buildings, or a building for carrying on the business of the said Bank, or to some such effect; and that they believed it to be true that the said Respondent Thomas Henty did take the opinion of the barrister in the said bill mentioned, as to the propriety of the said proceedings upon some case or statement made for that purpose, and that upon such case or statement he was advised that the said application of the said sum of 50*l.* and the intended application of the said sum of 59*l.* 15*s.* 11*d.* were misapplications of the said funds of the Institution; but they said that, to the best of their knowledge, remembrance, and belief, the case so submitted by the said Thomas Henty to the said barrister, for his opinion, was by no means a true or correct statement of the facts relating to the said proceedings and matters, and that the same were misrepresented or not correctly stated to him by the said Thomas Henty; and they admitted that the said Thomas Henty and Jeremiah Lear, or one of them, did produce and read in the presence of them, the said Defendants, at the said meeting of the 13th of December, 1830, the case submitted to the said barrister as aforesaid and his opinion thereon.

The said William Holmes further admitted, and the other Defendants believed, that William Holmes being then the bridge-warden, and having obtained plans and estimates for widening the said bridge, and made arrangements for completing the same, did, at the general meeting of the said trustees, held on the 13th of December, 1830, after the said case and opinion were read, state that the said money was already disposed of, and must be

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applied for the purpose for which it was ordered, and that the trustees had then no control over it, or to some such effect.

The Defendants further said that the bridge was a great thoroughfare, and that the widening thereof would be a great improvement thereto, inasmuch as it would be a great convenience to the public, and allow carriages to pass each other thereon. And they said, that the Defendant William Holmes was, in October 1830, elected mayor of Arundel, and that the mayor of Arundel, for the time being, is bridge-warden, and always has the superintendence and management of the said bridge, from two sums of money, of 2*l.* per annum and 3*s.* per annum, payable by the owners of two houses in Arundel; and if these sums were not sufficient, then the deficiencies had been, for many years past, paid for the repair of the said bridge by the overseers of the parish of Arundel, either to the bridge-warden or to the persons to whom the bills might be owing for the repair thereof.

And the said Defendants believed that the said houses were respectively, by law, liable to the payment of the several sums of 2*l.* and 3*s.* for the repair of the said bridge, and that the corporation of Arundel had never paid, or been liable to pay, any thing towards the repair of the said bridge, and were no otherwise interested in the repair of the said bridge than as owners of about 100 acres of land in the said parish of Arundel, being about a hundredth part of the annual value of the said parish.

And by the said answer the said Defendant William Holmes said, and the other Defendants believed, that in 1806 the Defendant William

Holmes was elected treasurer of the bridge-rates of and within the rape of Arundel in Sussex, and continued in such office till 1814, and that he then left it on account of the illegal or supposed illegal manner in which the bridges were managed; and that in or about 1806 and 1814, nine bridge-rates were made on the inhabitants of the rape of Arundel (but not on the inhabitants of the parish of Arundel itself, though it was in the midst of the rape) by the Courts of Quarter Sessions holden for the west part of Sussex, and received and expended by him the said William Holmes, as such treasurer, as the said Courts from time to time directed.

And that from ancient documents which he the said William Holmes had seen, he believed that Arundel Bridge had if not in every instance, for centuries past, generally been built by subscriptions amongst the inhabitants living in the western part of the county of Sussex (materially aided by large donations from the former Dukes of Norfolk); that it was anciently kept in repair by the said sums of 2*l.* and 3*s.* annually paid for the repairs thereof, and more recently, and up to the then present day, had been kept in repair by such sums and from payments and contributions from the overseers of the poor of the said parish of Arundel; and that from time out of mind, the public or (what is usually termed in other counties) county bridges in Sussex have been repaired as follows, (that is to say,) in the eastern part of the said county, by assessments on the said three rapes jointly, for all the public bridges in those rapes; and in the western parts, by assessments made on the several rapes separately, in respect of their respective bridges, (the parish of Arundel, situate in the midst of the

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rape of Arundel, not having been assessed, or if assessed, never paying the rate,) and that so it continued to the time of filing the said answer.

And the said Defendants admitted that they were either occupiers or owners of property in the parish of Arundel, as well as in the rape of Arundel, and out of the said parish of Arundel, and in other parts of the county of Sussex, (that is to say,) the Defendant William Holmes owned property of the annual value of 250*l.*, and occupied property of the annual value of 50*l.* in the said parish of Arundel, and owned property of the annual value of 500*l.* in the said rape of Arundel, not being in the said parish of Arundel, and owned property in the county (including the rape and parish of Arundel,) of the annual value of 752*l.* 10*s.*; and that the Defendant James Hopkins was the owner of property of the annual value of 10*l.* in the rape of Arundel, not being in the said parish of Arundel, and of 194*l.* in the county of Sussex, not being within the rape of Arundel, and occupied property of the annual value of 73*l.* in the parish of Arundel, and county of Sussex; that the Defendant John Cole Tompkins was the owner of property of the annual value of 18*l.* in the said parish of Arundel, of 235*l.* in the said rape of Arundel, and not in the said parish of Arundel, and of 253*l.* in the said county of Sussex, and is also the occupier, to the annual value of 2*l.*, in the said parish of Arundel, and of 250*l.* in the said rape of Arundel, and of 252*l.* in the said county of Sussex; and the said William Holmes, James Hopkins, and John Cole Tompkins, by their said answer, admitted that they were members of the corporation of Arundel.

And the said Defendants denied, for the reasons thereinbefore mentioned, that the said meeting of the trustees, at which the said resolutions (hereinbefore set forth) were passed, was not duly called, for the said Defendants said that notices of such meeting were sent to them the said Defendants, and, as the said Defendants believed, to the said Plaintiffs (Respondents) as trustees, and to all the other trustees of the said Bank living near Arundel, or who had been acting within two years previously, and that such notices were dated the 4th of December, 1828, and signed by the actuary of the said Society, and in every respect conformable to the usual practice of the Society in calling of general meetings.

Henry James Parsons, by his answer, admitted that he was occupier of the vicarage house and garden in the parish of Arundel, and, as vicar of Arundel, was, at the time of filing his said answer, owner of the vicarage of Arundel.

In other respects his answer was in all material statements to the same purport and effect with the answer of the other three Defendants.

On the 17th day of August, 1831, notice was given of a motion for the production of the documents admitted by the said Defendants to be in their possession, and that the said Appellant William Holmes might be ordered to pay into court the sum of 54*l.* 15*s.* 11*d.* On this occasion the Appellant filed an affidavit, in which he swore that since the filing of the joint answer he had expended the sum of 446*l.* 12*s.* in widening Arundel Bridge. The motion was heard before the Lord Chancellor in November, 1831; it was resisted on the ground that the money had been duly appropriated to defray

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the expenses of widening Arundel Bridge, and that such an employment of the money was not a misapplication of it. The Lord Chancellor* was of

* On that occasion the Lord Chancellor made the following observations : —

In this case the question turned principally upon the construction of the 8th Geo. 4. chap. 92., the act as to the savings' banks, and upon the conduct of certain parties who had been acting as trustees for the Arundel saving bank. It was a motion, that four of seventeen persons, trustees, those four being the only defendants, should pay money into court, that money being the sums which they had received, admitted they had received, and in whole or in part (in my view of the case, it signifies not much, if at all) expended, according to the decision of the trustees, convened at an ordinary general meeting without special notice, and at which meeting the question had been raised, how the surplus funds of the bank, in their hands, should be disposed of. Now I am of opinion, upon the best consideration I have been able to give to the case (as to the great importance of which I entirely agree), that if it is clear that the trustees had no right to apply the money in the way in which they did apply it, I am entitled to call upon those trustees who are at present before the court or one of them (I think the motion is made against Mr. Holmes) to pay that money into court. The question is whether it be clear that that was, though *bonâ fide* and without any imputation upon the correctness of the conduct of these gentlemen, whether it was, technically speaking, and upon the construction of the act of parliament, a misapplication of the trust funds ; and upon the best consideration that I have been able to give to this case, I have no doubt that it was a misapplication of these funds.

(His Lordship then, after going into a detailed calculation as to how the surplus had arisen, proceeded as follows : —)

All I have to do at present is to show the grounds on which I feel that there is no doubt, (for I ought to have a clear opinion, before I order the money to be paid into court,) but I can have no doubt that this money has not been well taken care of, and that it ought to be brought into court, where it is quite clear it will be properly applied. Now the twenty-second section provided that within six weeks after the 20th of November, or as soon after as conveniently may be, where no other provisions are made by the rules of the society for the disposal of the

opinion that the Defendants had no right to apply the money to that purpose ; and on the 26th of

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surplus, that it should be disposed of in such manner as the trustees or the major part of them assembled at any general meeting to be convened, according to the rules, should think fit. The first question that arises is upon the kind of meeting and the mode of convening the body who came to the resolution, and made the order ; and though I am certainly inclined to think there ought to have been a meeting convened for the purpose, and with express notice, and that that was in all cases, as I stated at the hearing of the motion, the safe construction towards which to lean to require notice ; and though I think that the words here, even strictly, will bear that construction better than any other — “ a general meeting to be convened as soon after as conveniently may be,” — yet, as that is not absolutely necessary to be decided on the present occasion, if I am of opinion that, how formally, regularly, and legally soever the meeting may have been convened, it did that upon its assembly which it had no right to do, I certainly should not stop, because it would be going out of the way, to dispose of that first question in the cause. For the same reason I shall not say any thing about the other point, whether the majority of the trustees who concurred in that resolution ought to have been an absolute majority, or only a majority of those convened who were at the meeting, for a like reason that it is not necessary to be decided, holding the opinion I do on the main body of the question — the application or misapplication at the meeting, however convened, concurred in by whatever majority of the trustees, whether an absolute majority or only of the trustees who assembled, that that question, that main question is to be decided against the trustees, and consequently this decision renders the raising of the other two questions, one and both, wholly unnecessary. It is to be observed that the section requires them or enables them to make this appropriation ; and it signifies not whether it only so enables or requires after retaining so much as would be necessary for and towards the future purposes and management. Now it is said that the words are perfectly clear, and give an absolute discretion to the trustees, to do whatever they please with this fund that is not prohibited by law, or by the rules and regulations of the society. And it is said, in answer to the question, why, according

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November, 1831, his Lordship ordered that the said Appellant William Holmes should, on or before

to this, they may put the money into their own pockets—No, they cannot put it into their own pockets, because they are expressly prohibited by the regulations of the society, and indeed the society would have no benefit of the act, if it had not such a regulation: they are expressly prohibited by those rules, and by the act itself, from taking any beneficial interest whatever. There seems some doubt, whether that regulation applies to all beneficial interest, direct or indirect, or whether it is not rather framed to strike at the preventing of their holding offices of profit, taking salaries, and being employed;—their being contractors, for instance, and taking any benefit or emolument in that kind of way; but I need not enter into that question at present, because it really does not go to affect, one way or the other, the opinion which I have formed upon the construction of the act. It must be admitted to be a startling proposition, (and yet it is one which those who maintain that the trustees were justified in that appropriation of the fund cannot recede from, but must take and must adopt,) that persons being appointed trustees of a savings' bank, the object of which institution is known and definite, namely, the sustentation of persons in poor circumstances by means of their savings deposited, withdrawing them either when they change their mind, or when they fall into bad circumstances, and are under the necessity of doing so—that this being the object, and only object of the institution, and the trustees having vested in them the management of that institution, and of none other, should have power, without any authority whatever from those who appointed them—without any authority whatever but what may be supposed to have been conveyed to them by the words of the act of parliament in question, of diverting the fund to totally different objects, of carrying it into a wholly different quarter altogether, of laying it out in a way that has no more to do with the objects of the institution than it has to do with the objects of any other the most dissimilar institution; as I put it to the learned counsel, in the course of the argument, that provided they did not do an illegal act, any act either unlawful at common law, or prohibited by some statute including the rules and regulations of this society, they might do any thing they chose, however wide of the objects of the

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institution over which they had a control, however fantastical in itself, provided they thought fit; for the words of the act, if carried to the extreme, make them the judges of what is fit or not, steering clear merely of the law and nothing else: they might do whatever they chose with these funds, be it ever so unlike or ever so opposite to the principle of the institution committed to their care; that for instance they might, as they have here, apply the fund in repairing a bridge—(that of itself is almost as wide as can be well imagined of the object of a savings' bank,)—that they might not only apply it to the repairing of this Arundel bridge—(I don't stop to inquire into the question, whether that is of utility for the inhabitants of the town or for the benefit of the King's subjects or not, because my opinion don't rest upon that)—they might not only have repaired Arundel bridge with it, but they might have repaired Southwark bridge, or York bridge with it, or they might have bestowed it upon charities in the kingdom of Ireland, or might have sent it abroad to foreign parts, or might have applied it to the funds of the Bible Society, or might have applied it to the lawful expense of a contest for the election of members to serve in parliament; for I can see no limit whatever, provided no law is broken, to the discretion which would be vested in those trustees, if the argument is to be allowed which leaves it to them to decide, provided they decide for nothing that is not positively prohibited by law. That is a proposition sufficiently startling of itself to make one look very narrowly into the object of the act of parliament, and into the other provisions by which that object is sought to be accomplished. Now the twenty-third section appears to be material in this view, although I agree that it applies not to the saving we are here dealing with, but to the new savings subsequent to the 20th of November, 1828, after deducting all such expences as the trustees may deem proper: They are to pay over to the Commissioners for the National Debt the surplus, reserving such portion as may be necessary to meet the current expences; and that surplus which they pay over is to be carried from the account in which it stood before, into a separate account,—I suppose for the purpose of preventing it bearing interest. I do not know whether that is the object, but it is to be carried to a

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General of the said Court, to the credit of the said cause, the said sum of 592*l.* 15*s.* 11*d.*, and that the

separate and distinct account, and applied as any other money according to the provisions of that act may be applied, provided always that it shall be lawful for the trustees to claim and receive from the commissioners, who are hereby required to pay the same, upon such certificate as they may appoint, (that is to say, they are to appoint the form of the certificate,) any such sum so by them received for the purposes of the institution.

Now I take it upon this that no doubt whatever can arise. I take it to be perfectly clear that, if the question had been the construction of this section, and not of the twenty-second—if, in short, the question had arisen respecting the surplus since the 20th November, 1828, and not as it does only with respect to the surplus previous to the 20th November, 1828, there could be no doubt it would only have given the trustees the power after they had come in, to claim, and call on the commissioners to pay for the purposes of the institution; and that they would have in vain attempted to have gone with a certificate, (whatever the form might have been which the commissioners might have adopted), stating the object for which they wished to have money out to be the repairing of Arundel bridge. Now, if so, I think we may safely consider that the twenty-third section is to be taken along with the twenty-second section; and we may construe the one with the other, and assume that, as for the future, so for the past savings, they are to be applied for the purposes of the institution.

It may be said, and was no doubt contended with great force, and with great ingenuity as well as force, that you are in a great difficulty as to what you can do with the fund. How can you apply it? Admitting, as the learned counsel in candour were forced to admit, that there appears something violent in allowing such a total diversion of the funds from any thing like the object of a savings' bank, still, what are you to do with that money? The contributors of to-day are not the contributors of yesterday; the body is always changing; it is a fluctuating number of men, and the natural thing would be to give the accumulation of each man's deposit, the surplus of each man's accumulation, out to himself, and to none other; but it would be almost physically impossible to trace the person, in

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such a fluctuating body, who, under this rule, would be entitled. But that would apply just the same to the future savings as to the past, because it still will be a fluctuating body, and you still will have objects of the institution to supply; and, accordingly, the very same difficulty will arise on the construction of the twenty-third section. It will necessarily arise, I think, upon those words, "for the purposes of the institution," which is now alleged to arise on the construction of the twenty-second; but then it may be said, the legislature meant if it was not drawn out, that it should be applied "for the purposes of the institution," meaning the corporate purposes, if I may so speak, in contradiction to the giving back money to the individuals, such as making up deficits arising from accounts, paying arrears of bills, expenses of salaries, and so forth. If it cannot be applied for that, then the whole of this is meant to remain vested in the commissioners, and the public is to have the benefit of it. It may be undoubtedly said so. I do not see any reason for excluding that supposition from the construction of the twenty-second section. I do not say that that is absolutely excluded. But this observation I must make, that I do not feel pressed by the difficulty, as if it amounted to any thing like an impossibility of applying the fund, regard being had to the fluctuating nature of the body—of applying all those arrears previous to the 20th November, 1828, also to the purposes of the institution. One can imagine various ways in which money may be kept in hand to supply future deficits, and render it less necessary to draw out for those unexpected purposes; to render it less necessary to draw out under the twenty-third section the future arrears from that institution. At all events it must be admitted that this argument, as to the possibility of dealing with the funds arising in such a way, and beneficially possessed by such parties, by a fluctuating body, which would be applicable not only to the cases of savings' banks, but almost to every other institution which is not constituted a corporate body.

Therefore, upon the whole, I am of opinion that the trustees had no right to apply the money, as they have done; that it was a misapplication of the money: and they, having spent the money, part or most of it, in repairs, that they should restore that money, at least subject to the jurisdiction of

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and with the privity of the said Accountant-General in trust in the cause, who was to declare the trust thereof accordingly, subject to the further order of the Court: and it was ordered that the dividends to accrue on the said Bank Annuities, and all accumulations of interest, should be from time to time laid out in the purchase of like Bank Annuities, in the name and with the privity of the said Accountant-General, in trust in the cause; and he was to declare the trust thereof accordingly, subject to the further order of the Court: and it was ordered that the said Defendant William Holmes, and the said Defendants James Hopkins and John Cole Tomkins, should leave with their clerk in court in the said cause, the several books, cases, letters, and papers admitted to be in their possession, with the usual directions in that behalf.

The money was paid in, and was laid out in the purchase of 696*l.* 7*s.* 7*d.* 3 per cent. Cons. Bank Annuities.

The answers being replied to, and the cause

this Court, until the question is decided, which I have now stated my view of, in the present instance. If I am wrong, the parties will have abundant opportunity of considering and setting the matter right in the subsequent proceedings, when the main question to which I have principally directed my attention comes to be decided. If what I have said does not satisfy the parties (and I have no desire that it should not go further)—if it does not satisfy the parties, the question will go further, and receive subsequently a more full consideration either here or elsewhere; and I cannot help observing, if a subject of such delicacy and interest to the contributors of this bank is liable to any doubt whatever, with respect to the construction of this act of Parliament (and it is chiefly for that purpose that I have thrown out these observations), the sooner it is set right by a decree, or a new enactment (if necessary) the better.

being at issue, witnesses were examined on both sides, and certain admissions were entered into on the part of the Plaintiffs and the Defendants.

George Biddle, Actuary to the Society, after proving a book containing the rules of the Society and the names of the trustees, deposed, that at the meeting, held on the 11th day of December, 1828, a proposition was made touching the disposition of the surplus fund or stock of the Society, the purport of which proposition was, "that 100*l.* should "be retained for, or towards the future purposes "and management of, the Bank;" that 50*l.* should be paid for arrears of rent and firing to the fund of the Arundel School; that the remaining sum of 592*l.* 15*s.* 11*d.* should be paid over to the Defendants Henry James Parsons, William Holmes, James Hopkins, and John Cole Tompkins, for the purpose of paying the expense incident to the widening of the public bridge over the river at Arundel, the same being both narrow and dangerous, accidents having arisen thereon: and that in case counsel should be of opinion that the trustees were not so authorized to dispose of the money, that the same should be disposed of in such manner as the trustees and managers present, or the major part of them, at the annual meeting in the month of November, 1829, should order; that a case for the opinion of counsel should be prepared and submitted to the standing committee, to be settled by them; that the treasurer should withdraw the whole of the surplus sum of 742*l.* 15*s.* 11*d.*, and should dispose of it according to the preceding resolutions. And this Deponent further saith, he does not recollect which of the trustees made the said proposition, nor how many and which of the trustees

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present at the said meeting supported the said proposition, nor how many and which of them opposed it; that the said proposition was carried at the said meeting, but by what majority this Deponent does not know. And this Deponent further saith, that an entry was made in the said book of proceedings touching the said proposition; and that the said Defendant Henry James Parsons, the said Arthur Atherley, and M. A. Tierney, the said Defendants William Holmes and James Hopkins, and the said Thomas Constable, George Constable, and John Wilson, trustees, present at the said meeting, subscribed their names to such entry: but this Deponent does not know whether any and which of the persons whose names are so subscribed opposed the said propositions. That at a meeting of the 13th day of December, 1830, the Complainants Thomas Henty and Jeremiah Lear objected to the application of the surplus funds or stock to such purposes as those to which it had been proposed to apply it. And this Deponent does not recollect anything particular having been said by the Defendants; but there was a great deal of conversation and discussion amongst several of the trustees present, in consequence of which the trustees came to a resolution, which was entered into the said book of proceedings, to the following purport:—"That a general meeting should be called, on Monday, the 20th day of the said December, for the purpose of considering whether another case should be submitted to counsel relative to the appropriation of the sum of 592*l.* 15*s.* 11*d.*, which was placed in the hands of the said Defendants for the widening of Arundel Bridge." That at a meeting of the 20th day of

December, 1830, the Complainants Thomas Henty and Jeremiah Lear again objected to the application of the surplus fund or stock of the Society in the manner proposed; but that he cannot recollect that the Defendants made any particular statement: that there was a good deal of discussion amongst the trustees, but what words were spoken, or what was said by the Defendants, or by any particular trustee, this Deponent cannot recollect; that the said last-mentioned meeting made a resolution, which is entered in the said book of proceedings to the following effect:—"That no further case should be submitted to counsel relative to the appropriation of the said sum of 592*l.* 15*s.* 11*d.*, which was placed in the hands of "trustees for the widening of Arundel Bridge." That at the said two last-mentioned meetings this Deponent, as he has before stated, heard the two complainants Thomas Henty and Jeremiah Lear object to the application of the surplus fund or stock of the said Society, in the manner proposed, but does not recollect any particular answer thereto by the said Defendants, or either of them. And this Deponent further saith, that Mark Aloysius Tierney attended the said meeting of the 11th day of December, 1828; and this Deponent believes that the said Mark Aloysius Tierney did oppose the resolution entered into at the said meeting, for applying the monies to the purposes directed by such resolution.

The Rev. Mark Aloysius Tierney, of Arundel, Sussex, Catholic priest, deposed, that the form usually followed, in order to attest that any particular resolution has been passed or adopted at meetings of the Society by the majority then pre-

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sent, is for all the trustees then present to sign their names at the foot of the proceedings of such meeting; but there are instances in which the chairman alone has signed such proceedings: that the purpose for which the trustees sign their names to any resolution is two-fold, — one to testify the presence of the several trustees who attend such meeting, it having been the usual practice not to insert the names of the trustees present in the entries of the proceedings; and the other to attest that the particular resolutions included in such proceedings have been passed and adopted by the majority present at such meetings: that such signature does not imply, nor is it understood to import, that the trustees, so signing, individually approve of the resolutions, but are merely considered as attesting that the particular resolutions were passed and adopted at the meeting at which they were present, as he has before stated; and that before a resolution is carried by a majority of a meeting of the trustees of the said Bank, those who have opposed the same have signed the proceedings; that meetings of the trustees of the said Bank were held on the 11th of December, 1828, and the 21st of December, 1829; that it appears from the signatures of the names of the trustees in the book of proceedings that eight trustees were present at the first of the said meetings, and that eleven trustees were present at the second of such meetings; but whether any other trustee or trustees attended at either of the said meetings, and went away before the business was concluded and without signing the said proceedings, this Depo-
nent does not know and cannot depose to: That the names of the trustees who attended the said

meeting of the 11th of December, 1828, and signed the proceedigs, are Henry James Parsons, Arthur Atherley, Mark Aloysius Tierney, William Holmes, James Hopkins, Thomas Constable, George Constable, and John Wilson; and that the names of the trustees who attended the said meeting of the 21st of December, 1829, and signed the proceedings, are Henry James Parsons, Mark Aloysius Tierney, Owen Marden, Robert Watkins, William Holmes, John Tompkins, Thomas Constable, Samuel Evershed, Andrew Bartholomew, Richard Holmes, and James Hopkins; that at the said meeting, holden on the 11th of December, 1828, a proposition was made to apply 100*l.*, part of the surplus stock of the said Society, towards the future purposes and management of the said Bank; that another proposition was made to pay 50*l.*, further part of the said surplus stock, for arrears of rent and firing, to the fund of the Arundel School; and that a third proposition was made to apply the sum of 59*2l.* 15*s.* 11*d.* for the purpose of paying the expense incident to the widening of the public bridge over the river at Arundel; that the Deponent does not recollect by whom the proposition was made, but he believes that the second proposition was made by Henry James Parsons; that he cannot positively say by whom the third proposition was made, but the Deponent verily believes that William Holmes either made, or seconded, the third proposition; that the two first propositions were carried unanimously, and entered in the book of proceedings; that as to the third proposition much discussion arose; that it was supported by five of the eight trustees whose names are subscribed to the proceedings, as before mentioned,

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namely, William Holmes, James Hopkins, Thomas Constable, George Constable, and John Wilson, and was opposed by the remaining three trustees, namely, Henry James Parsons, Arthur Atherley, and this Deponent; and that on a division there was a majority of two of the said eight persons in favour of the said third proposition, but the Deponent says no entry was made in the said book of proceedings touching this resolution: and he saith, that in consequence of the continued remonstrances made by the said Henry James Parsons, Arthur Atherley, and this Deponent, against the illegality as well as the injustice of such an application of the money, another resolution was proposed, and, as he verily believes, by the Defendant William Holmes, to the following effect: — “ That the said “ sum of 59*l.* 15*s.* 11*d.* should be paid over to “ the Reverend James Parsons, William Holmes, “ James Hopkins, and John Cole Tompkins, for “ the purpose of paying the expense incident to “ the widening of the public bridge over the river “ at Arundel; ” and that in case counsel should be of opinion that the trustees were not so authorised to dispose of the money, the same should be disposed of in such manner as the trustees present, or the major part of them, at the annual meeting in the month of December, 1829, should order, and which proposition was carried, and substituted for the former resolution, and entered in the said book of proceedings; and the Deponent does not recollect any division on the last-mentioned resolution, or that any opposition was made to it by any of the trustees present, although the opinion of himself, and the said Henry James Parsons and Arthur Atherley, remained unchanged: and the

Deponent saith he did not oppose the last-mentioned resolution, because it offered the only chance of recovering the money voted away by the previous resolution, for what he conceived to be the legitimate object of the fund: And he further saith, that it was proposed that Mr. Atherley and himself should be two of the persons to whom the money should be paid over, but they refused to accede to such proposal; that at the said meeting of the 21st of Dec. 1829, the case at the meeting of the 11th of December, 1828, directed to be prepared for the opinion of counsel, was produced, with the opinion and further opinion of Mr. Tinney thereon; that there was considerable discussion on the contradictory opinions of Mr. Tinney, but he does not recollect whether any specific proposition was made at this meeting touching the disposition of any part of the said surplus fund; that he was present at the meetings of the trustees of the said Bank, on the 13th of December, 1830, and the 20th of December, 1830; that, as appears by the book of proceedings, sixteen trustees attended the said first-mentioned meeting, namely, the Reverend Mr. Cartwright, the Reverend Mr. Hardy, the Reverend Mr. Tierney, the Reverend Mr. Marden, Messrs. William Holmes, Richard Holmes, Watkins, Tompkins, Hopkins, Henty, Calhoun, Lear, Fletcher, Evershed, Salter, and Blanch, and that, as appears by the said book of proceedings, eighteen trustees attended the said meeting of the 20th of December, 1830, namely, the Reverend Mr. Tierney, the Reverend Mr. Marden, the Reverend Mr. Hardy, Messrs. Drewitt, S. Evershed, Hobbs, T. Constable, Bartholomew, Blanch, G. Constable, Wardroper, Shoesmith, Tompkins, Wilson, Hop-

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kins, Lear, Henty, and Calhoun; that at both the said meetings the Complainants Jeremiah Lear and Mr. Henty (but whether it was the Complainant Henty or not this Deponent cannot say, for the reason mentioned in the Deponent's answer to the first interrogatory) objected to the application of the said surplus fund to the purposes to which the Defendants proposed to apply it; that Deponent does not recollect what particularly was said by any of the Defendants touching the said surplus fund or the application thereof at the said meetings; that at the meeting, held on the 11th of December, 1828, the said Arthur Atherley and the Defendant Henry James Parsons did, in the presence and hearing of this Deponent, and in the presence and hearing of the Defendants William Holmes and James Hopkins, object to and remonstrate against such application of the surplus stock of the Society, as in the pleadings of the said cause mentioned, and did contend that such application was illegal and unjust; but he does not remember what was said by the said two Defendants in answer thereto; that at a meeting of the said trustees, held the 21st of December, 1829, objections were likewise urged against the proposed application of such surplus stock, that the Deponent did, at the said last-mentioned meeting, object, as he always had objected, to the said proposed application of the same, and suggested that as the resolution of the 11th of December, 1828, contained only a conditional appropriation of the money, and allowed the then meeting, in a certain condition, to dispose of it otherwise, the trustees of the Bank still possessed a power over the same, and might then order it to be otherwise applied; to which suggestion the Defendant William Holme replied,

that the resolution of the 11th of December, 1828, gave such conditional power to a meeting to be held in November, 1829, but that not having met until December, they were too late; to which the Deponent replied, it was unfair to take advantage of a clerical error which had occurred in consequence of an alteration in the rules, and that it was well known that though November was specified in the resolution, it was only intended to designate the next general annual meeting of the trustees.

Charles Street, one of the clerks in the banking-house of Messrs. Hopkins, Drewitt, and Wyatt, of Arundel, deposed, that James Hopkins, one of the said firm, is the treasurer of the Arundel Provident Bank, that the said banking-house, in consequence as he believes of an order from the trustees of the said Provident Bank, received, on the 30th day of December, 1828, a Government debenture for the sum of 645*l.*; that, in pursuance of a resolution of the said Provident Bank, agreed to, as he has been informed and believes, at a general meeting of the trustees of the said Provident Bank, holden on the 11th day of December, 1828, the sum of 50*l.*, part of the amount of the said debenture, was placed to the account of the trustees of the Arundel School: that the said sum of 645*l.*, the amount of the debenture, was placed to the account of all the above-named Defendants, at the time it was so paid into the said banking-house; and after the transfer of 50*l.* to the account of the trustees of the Arundel School as aforesaid, the sum of 595*l.* remained to the credit of all the said Defendants, until the 9th day of March, 1831, when the sum of 592*l.* 15*s.* 11*d.*, part of the said 595*l.*, was transferred from the account of the said

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Defendants and placed to the separate account of the said Defendant William Holmes, at the said banking-house, for the purpose of paying the expense incident to the widening of the public bridge over the river Arun, as this Deponent verily believes, and as is stated in a receipt, dated the said 9th day of March, given to the said James Hopkins, by the said Defendant William Holmes, under his hand, for the said sum of 59*l.* 15*s.* 11*d.*, and left at the said banking-house; and that the sum of 2*l.* 4*s.* 1*d.*, the remaining part of the said Government debenture, still remains to the credit of all the said Defendants in the said banking-house.

The following admissions, entered into by the Plaintiffs and Defendants in the cause, were read at the hearing.

That the document marked with the initials of Edward Hillier and Edward Blackmore, in their respective hand-writing, numbered 1, shall be received, without further proof, as the original case, and additional case, stated for the opinion of counsel, and as the opinions thereon, respectively bearing date the 29th day of October, 1829, and 14th day of November, 1829, referred to in the schedule to the answer of the three first-named Defendants; and that the same were laid before William Henry Tinney, Esq.; and that the opinions thereon are his opinions; and that such opinions and the signatures thereto, are severally of the hand-writing of the said W. H. Tinney, as set forth in the answer of the three first above-named Defendants.

That the several documents signed with the same initials, and numbered 2, 3, 4, 5, and 6, are

true copies of the notices referred to in the said schedule, from the actuary of the Society, for the meetings holden on the 13th November, 1828, 27th November, 1828, 11th December, 1828, 21st December, 1829, and 20th December, 1830, and which were forwarded to the trustees or managers of the said society for the several meetings respectively, and that the same were so forwarded in the usual mode of forwarding such like notices.

That the rules of the society, set forth in a book, purporting to be printed in the year 1818, and the rules of the society, set forth in a book, purporting to be printed in the year 1824, and the rules of the said society, set forth in a book purporting to be printed in the year 1829 (all referred to in the said schedule to the said answer), and marked with the like initials, and numbered 7, 8, and 9, were respectively the rules of the said society and were duly constituted such rules according to law; and that the latter-mentioned rules were and are comprised in the rules signed by the under-mentioned solicitors, as well as by the clerk of the peace of the county of Sussex, and were duly certified and allowed by John Tidd Pratt, Esq., the barrister duly appointed for that purpose, and were duly signed, enrolled, and registered by the said clerk of the peace, in pursuance of the act of parliament in that case made and provided at the several times and dates specified on the enrolment thereof, and that the copy of such enrolment, marked with the aforesaid initials, shall be taken as a true copy of such enrolment, without further proof.

That the names of Thomas Henty and Jeremiah Lear, entered in the list of the trustees, contained

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in the books numbered 7, 8, and 9, are two of the plaintiffs in the cause; that the list printed in the said book, numbered 9, is a true copy of a list purporting to be the names of the trustees of the said society, entered in their minute-book on the 27th day of November, 1828.

That notices of the meetings of the said trustees of the said society were from time to time sent to the said plaintiffs, Thomas Henty and Jeremiah Lear, by the actuary of the said society, and that the said Plaintiff, Thomas Henty, attended and acted as a trustee of the said Society, at the several meetings of the trustees, held the 13th March, 1827, 21st December, 1829, 13th December, 1830, and 20th December, 1830.

That the Plaintiffs, Robert French and John Lear, are respectively depositors in the Arundel Provident Bank.

That the minute-book of the said society, commencing in the year 1818, and continued from thence to the year 1831, (which minute-book, so far as respects the several orders and resolutions entered therein, it is agreed shall be admitted in evidence in the cause, in like manner as if the same had been duly proved,) contains the several proceedings, orders, and resolutions, which have been from time to time, had, made, and passed, at the several meetings of the trustees of the said society, at which the same purport to have been, had, made, and passed.

That the application of the surplus funds, as proposed at the meeting of the 11th of December, 1828, was objected to by the plaintiff Thomas Henty, at the meeting of the 21st December, 1829, and by the said Thomas Henty and Jeremiah Lear,

at the meeting of the 13th and 20th December, 1830.

That the two several documents, marked with the said initials of the said Edward Blackmore and the said Edward Hillier, numbered respectively 10 and 11, (described in the said schedule to the said answer,) are respectively the letter (dated 17th December, 1830,) and receipt (dated 9th March, 1831,) of the said Defendant William Holmes; and that the name "W. Holmes" subscribed thereto respectively, is of the hand-writing of the said Defendant William Holmes; and that the sum of 59*l.* 15*s.* 11*d.*, mentioned or referred to in the said receipt, is the same sum as is mentioned in the pleadings of this cause, and admitted by the said William Holmes to have been received by him.

The minute book contained an entry of the resolutions in question for the appropriation of the fund.

The Case and opinions referred to in the Admissions were as follow: —

CASE.

Herewith left is the act to consolidate and amend the laws relating to Savings' Banks, 9th Geo. IV. c. 92, to the 22d section of which your attention is particularly requested, because it is as to the appropriation of the surplus fund in that section mentioned that your opinion is requested.

Herewith also left are the rules and regulations of the Arundel Savings' Bank, under which the surplus created was in existence at the passing of that act, by which rules and regulations you will

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perceive there is no provision for the appropriation of the surplus fund.

Hereto annexed is a copy of the order made by the trustees or managers, for the disposal of the surplus, at their meeting holden for the purpose of making the order agreeably to the act.

Copy order annexed.

- ‘ From the Arundel Provident Bank of proceed-
‘ ings, 11th December, 1828.
- ‘ That the sum of 100*l.* be retained for or
‘ towards the future purposes and manage-
‘ ment of this Bank.
- ‘ That the sum of 50*l.* be paid for arrears of rent
‘ and firing to the fund of the Arundel
‘ School.
- ‘ That the remaining sum of 592*l.* 15*s.* 11*d.* be
‘ paid over to the Reverend Henry James
‘ Parsons, William Holmes, James Hopkins,
‘ and J. C. Tompkins, for the purpose of pay-
‘ ing the expense incident to the widening the
‘ public bridge over the river at Arundel, the
‘ same being now both narrow and dangerous,
‘ accidents having arisen thereon; and that
‘ in case counsel be of opinion that the trustees
‘ are not so authorized to dispose of the money
‘ that the same be disposed of in such manner
‘ as the trustees and managers present, or the
‘ major part of them, at the annual meeting,
‘ in the month of November, 1829, shall
‘ order,
- ‘ That a case for the opinion of counsel be pre-
‘ pared and submitted to the standing com-
‘ mittee to be settled by them.
- ‘ That the treasurer do withdraw the whole of
‘ the surplus sum of 752*l.* 15*s.* 11*d.*, and do

‘dispose of it according to the preceding resolutions.’

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With respect to the order for disposing of the remaining sum of 592*l.* 15*s.* 11*d.*, so much of it as required the payment of the sum over to the Reverend H. J. Parsons, W. Holmes, James Hopkins, and John Cole Tompkins, was carried into effect immediately after the order was made. The sum of 592*l.* 15*s.* 11*d.* now remains in their hands.

Your opinion is requested whether they can safely apply the money for the purpose mentioned in the order ; or in other words, whether the trustees or managers had authority to make the order.

OPINION.

Lincoln's Inn, 29th Oct. 1829.

I am of opinion that Messrs. Parsons, Holmes, Hopkins, and Tompkins, cannot safely apply the sum of 592*l.* 15*s.* 11*d.* to the purpose directed by the order of the 11th December, 1828. I think the trustees and managers had not authority to make the order for such application.

The trustees and managers, or some of them, are probably liable to contribute to the expenses of the repairs and even the widening of the public bridge. At all events, the trustees and managers resident in or near Arundel would receive benefit from the proposed application, contrary to the second rule, and indeed contrary to the act, 9th Geo. IV. c. 92, s. 6, as well as to the original act of 57th Geo. III. c. 130, s. 3. A further difficulty occurred to me which the question put has not made it necessary for me to consider. The present Institution was of course established under

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the act, 57th Geo. III. c. 130; now the first section of that act speaks of Societies established only for the benefit of the depositors. Under that act an application of the surplus fund to a purpose wholly foreign from the objects of the Society would have been questionable. That act is repealed, and the 22d section of the act 9th Geo. IV. c. 92, seems to give a discretionary power of application to the trustees and managers, so that they do not derive any benefit from the appropriation. It may yet deserve consideration whether the trustees should consider an application not beneficial to any of the depositors, as a fit and proper appropriation of the surplus of the depositors' fund. On comparison of the 2nd section of the act 9th Geo. IV. c. 92, with the 1st section of the 57th Geo. III. c. 130, a slight variation of expression with respect to the objects of a Savings' Bank Institution occurs. I throw this out merely for the consideration of the trustees and managers, not having thought it necessary to arrive at a conclusion upon it.

W. H. TINNEY.

FURTHER CASE.

There is no foundation for the presumption that any of the trustees or managers are liable to widen the bridge.

Several of the trustees and managers were and are depositors, so that the distribution of the surplus amongst either the former or present depositors would be in direct violation of the second rule; besides, as it should seem in opposition to the spirit of both the acts of parliament, as the former one limits the amount of interest, and the

latter (because it was before too much) lessens and limits it.

No English coin could be found small enough to repay the difference to any of the trustees and managers for the benefit they would derive from this money being applied to the repairs of the bridge, (but the order is '*widen*,' and there is no intention to apply it towards repairs,) and the application of the money to the discharge of the National Debt, where it is to go, (of course to the benefit of the trustees and managers contrary to their second rule,) unless it be otherwise disposed of by their order, respecting which, *vide* the mistake in the order of the mention of the month of November, and the act which directs the month of December.

In case you should still remain of opinion that this money cannot be applied towards widening Arundel bridge, be pleased to point out what other safe mode the trustees (in whose names it is now placed) can adopt to dispose of the money.

FURTHER OPINION.

Lincoln's Inn, 14th Nov. 1829.

On reconsideration of the acts, and being assured that the trustees and managers are not in any manner liable to widen the bridge in question, I think the objection and doubt I made to the proposed application of the money are not tenable.

My chief reasons are, that a mere public accommodation is not, I think, a personal benefit to the trustees within the meaning of the acts and of the rules; and that by the act 1st Geo. IV. c. 83, s. 13, it was expressly provided that any increase in the stock, beyond the stipulated rate of interest, should

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be applied and disposed of *amongst the depositors*, as the trustees, at a meeting, &c., *should think fit and proper*.

The new act, in making the power *general*, I think, repeals the restriction; and therefore the application need not be for the benefit of the depositors.

I cannot determine whether the meeting, at which the order was made, was a regular general meeting, within the 9th Geo. IV. c. 92, s. 22. The rules and regulations furnished to me contain nothing about the convening of a general meeting.

I presume the meeting was regular; and am inclined to think that if it was according to the practice, and especially *upon due notice*, within rule 26, it would be sufficient.

I do not see the force of the observation about the mistake of November for December in the order. I have not met with anything in the acts requiring the meeting to be in December.

W. H. TINNEY.

Then followed copies of the notices for calling general meetings of the Society, and of the rules and regulations of the Society, with the names of the trustees.

These notices were numerous, but almost all of them in nearly the same terms. The following was one addressed to Mr. Holmes, upon the subject in question:—

Arundel School, 14th Dec. 1830.

SIR, — A general meeting of the trustees of the Arundel Savings' Bank will be held at this place on Monday, the 20th instant, at one o'clock, for the purpose of considering whether another case

should be submitted to counsel, relative to the appropriation of the sum of 592*l.* 15*s.* 11*d.*, which was formerly placed in the hands of trustees for the widening of Arundel bridge, and whether the report of the committee concerning the description of persons in future to be allowed to become depositors in this Bank shall be adopted. Your attendance is very earnestly requested.

Sir, your most obedient servant,

GEO. BIDDLE, *Actuary.*

W. Holmes, Esq., Arundel.

The rules and regulations of the Society, printed in the years 1818, 1824, and 1829, with the names of the trustees.

The letter and receipt of the Appellant mentioned in the admissions were as follows:— to Messrs. Hopkins and Co., Bankers, Arundel, and to Mr. James Hopkins, the Treasurer to the Arundel Savings' Bank.

Brookfield, 18th Dec. 1830.

GENTLEMEN*,

In consequence of a letter from the actuary of the above Bank, addressed to the trustees, calling a general meeting, for the purpose of considering whether another case shall be submitted to counsel relative to the appropriation of the sum of 592*l.* 15*s.* 11*d.* now in your hands as bankers, placed there in the names of trustees for the widening of Arundel bridge, it is my duty, as bridge-warden for the present year, to inform you, that that sum of money is already irrevocably appro-

* This letter contains the substance of the Appellant's argument on hearing the appeal.

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priated, according to the provisions of the act of parliament for disposing of it.

On the perusal of the 9th Geo. IV. cap. 92, sec. 22, and the order of the trustees of the 11th December, 1828, you will find this to be the case; and by the subsequent correspondence between the committee of the last year and the National Debt Office, contained in the book of proceedings (of the Savings' Bank), you will also discover that those who represent the National Debt Office are satisfied of the legality and propriety of the mode in which the money has been appropriated; and if they were not so satisfied, it would be for them, and not the trustees of the Savings' Bank, to dispute the propriety of its appropriation.

You are probably aware that (after the meetings in the two past years approving of the mode of appropriating this money and refusing unanimously, save one, the further consulting of counsel on the subject) at the annual meeting of the present year, an anonymons statement or case of the most slanderous and deceitful nature on this subject was produced and read, and that the opinion of Mr. Pratt, founded on such statement, was also read; that Mr. Pratt should have been so much misled as to have been induced to give such an opinion, every public good man may regret. The opinion states that the money should have been distributed amongst the depositors.

Now the second rule of the Savings' Bank was that no trustee or other person, having any control in the management of this institution (except the clerk), should derive any benefit therefrom, and many of the trustees (amongst them the collector

of the Customs at this port) were depositors to a very considerable amount; so that the manner in which Mr. Pratt says the surplus money should have been distributed is clearly wrong, and by reference to the regularly distributed Statutes you will find, not only that section 8, which he alludes to in his opinion, was a clause copied from the first act of parliament, passed before any surplus fund existed, and therefore could not possibly apply to that fund.

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It was the intention of the narrow-minded gentleman, who drew the last act, that the surplus money should go to the depositors, yet the more liberal mind of Parliament directed otherwise; and this is most miraculously made manifest by the appearance of the word "distributed" in the marginal note of the above-mentioned section 22, directing the appropriation of the surplus money, and its omission in the body of the clause, wherein the word "appropriate" only is to be found.

To have distributed this money amongst the depositors would have been to have appropriated it in direct opposition to the second rule of the Society, and consequently in direct opposition to the acts of parliament.

It would have also been in direct opposition to that rule to have allowed the money to have been applied for the reduction of the National Debt, for which it would have gone but for this rule, and the very proper order of the trustees for otherwise appropriating it, because the trustees would or might have derived a pecuniary benefit in the discharge or reduction of the National Debt.

It was under these difficulties, and after it had

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at two previous meetings of the trustees been stated that an intention of proposing a mode for appropriating this surplus money, in the absence of any other proposal from any other trustees, would be proposed by me, (and this, as well as the manner of the appropriation, was communicated to most of the trustees who attended those meetings,) that I did propose that this 'surplus money should be 'appropriated for the purpose of paying the expense incident to the widening of the public 'bridge over the river at Arundel, accidents having 'arisen thereon.'

This appropriation of the money, that very able and conscientious King's counsel, W. H. Tinney, Esq., informed the trustees (they not being able to widen the bridge) was a proper application of the money according to the last passed act of parliament for appropriating it.

And he gives, as his reason, that 'the mere public accommodation was not a personal benefit to 'the trustees, within the meaning of the acts, and 'of the rules; and that the previous acts, by which 'the depositors were more benefited, were repealed 'by the last act,' and he might have added, because the last act was passed principally to lessen the interest on the deposits and other benefits to the depositors, which certainly is directly in opposition to the notion that they were to be benefited by the receipt of the surplus money, especially so far as the clause for so appropriating it was repealed by that act.

It is the duty of trustees of public monies to dispose of them not only for public but permanent purposes; and by the act of parliament in question

the money is directed to be so applied, in case the rules had not already disposed of it, and the trustees did not discover some more pressing occasion for it.

Personal or temporary benefits, such as clothing or food for the poor, however desirable at any moment, is not a proper appropriation of this money ; if so appropriated it would be in charity for a personal and temporary, and not a public and permanent purpose, which this act clearly contemplates.

We have all a right, and it is our duty as well as our pleasure, to put our hands in our pocket for charitable purposes, but the public money must be applied for public and permanent purposes for all his Majesty's liege subjects, not alone for A. B. and C. ; and whether it be so applied at Arundel, or at Charing Cross, it is equally for all his Majesty's liege subjects. Well would it have been for the kingdom at large if all the surplus money of the Savings' Banks had been disposed of for similar benefits, each in its immediate neighbourhood. I will instance one more to our own, namely, by the appropriation of the surplus money of the Pulboro' Savings' Bank, on Hardham Causeway (its immediate neighbourhood), all his Majesty's liege subjects would have been allowed to pass at all times : which is not the case now : and is there any man who will say that the money being appropriated for that purpose would not have been better applied for the public than the manner in which it has been appropriated, in which the public have derived no benefit whatever ?

On the day of the quarterly meeting of the committee of trustees, in June last, the comptroller of

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the Customs of this port (one of the committee) mentioned that the collector of the Customs had in very strong terms reprobated the manner in which the surplus money had been appropriated, and also stated that the collector had said that the trustees would act rascally if they did not allow him, as an original depositor, to participate in the distribution of the surplus money. If they had done so, in my judgment, they would have acted most grossly.

This is mentioned merely to show how much the collector of the Customs was mistaken, when, in addressing the trustees at the last meeting, he personally asserted himself to be totally disinterested, and asserted that I was greatly interested: now the collector was a large depositor, and I no depositor at all; on the contrary, in widening the bridge in the manner proposed, I shall personally experience a pecuniary disadvantage of about 200*l*., which I shall be compensated for only by the recollection that I may have tended greatly to the convenience of the public and my neighbours, amongst them the collector himself, who must daily cross the bridge, or give up his place in the Customs.

The estimate of widening the bridge exceeds, by near 200*l*., the money to be paid me for completing it; and I have neither the means of enforcing, or the intention of seeking for, any remuneration for this additional expenditure. Perhaps this fact being known to the gentlemen who think this money wrongly applied, and who have now again agitated this question, for reasons best known to themselves, it may be satisfactory to them: however, be it so or not, the money will be applied

agreeably to the orders of the trustees, the law of the land, and the act of parliament, as soon as practicable; and in the mean time I take leave to communicate to those who think themselves injured, or interested in the money, or that it is misappropriated, that I am more than ready to meet them before the Chancellor, or any other tribunal on earth which they may think proper to resort to. The more openly and the more fully (if openly and with truth and candour) this subject be discussed, the more agreeable to me; and after the many malicious insinuations against the Arundel inhabitants, respecting the appropriation of this money, especially that they were going to ease themselves of a burthen by appropriating it for the repair of the bridge, when it was never intended to have been so applied, but for widening the bridge only, that is, adding to it, and thus, by the increase of the size of the bridge, increasing the burthen of the inhabitants, it will not be just or honest if neither a public opportunity be given them of meeting their opponents, or a true representation of the case be made where it has been partially canvassed and grossly misrepresented.

You will be pleased to receive this as a notice not to part with the money but for the purpose mentioned in the order. It is quite proper that you should make this communication at the proposed meeting of the trustees of the Savings' Bank, on the 20th instant, where you have my authority to allow the actuary, or any one else, to read this communication, and the trustees have my assent for making what use of it they please.

I will just add, that I am a little surprised, although revolutionary movements are just now

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most fashionable, at the one here attempted ; and I would ask of the trustees whom they expect to obey their orders or wishes if, after their orders have been repeatedly made, considered, and confirmed, they are to be revolutionized by the production of such a slanderous case as the one produced at the last meeting, or indeed by any other means.

Obedience to orders, or compliance with rules, can only be expected by those who are consistent in forming and executing them ; and it is not because some are fickle and changeable that all should be expected to or should be so.

(Signed) W. HOLMES.

9th March, 1831.

Received of Mr. James Hopkins the sum of five hundred and ninety-two pounds, fifteen shillings, and eleven pence, the sum of money ordered on the 11th day of December, 1828, by the trustees of the Arundel Provident Bank, for the purpose of paying the expense incident to the widening of the public bridge over the river at Arundel.

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£592 15s. 11d.

On the 27th of February, 1833, the cause was heard before the Vice-Chancellor, when his honour declared that the application of any part of the surplus trust-fund belonging to the Arundel Provident Bank in the pleadings mentioned, for the purpose of widening the public bridge over the Arun at Arundel, in the county of Sussex, was a misapplication of the said fund ; and that the 696*l.* 7*s.* 7*d.* Bank 3 per cent. Annuities, standing in the name of the Accountant-General of the said Court, in trust in the said cause, and the sum of 20*l.* 17*s.* 10*d.* cash in the Bank placed to the credit

of the said cause, being cash arising from the dividends of the said stock since the purchase thereof, belonged to the said Arundel Savings' Bank; and it was ordered that the said 696*l.* 7*s.* 7*d.* Bank 3 per cent. Annuities, and the sum of 20*l.* 17*s.* 10*d.* cash, should be transferred and paid to the said James Hopkins the treasurer of the said Arundel Provident Bank, and for the purpose aforesaid the said Accountant-General was to draw on the Bank in the usual manner; and it was ordered that it should be referred to the Master of the said Court in rotation, to tax the said Plaintiffs their costs of the said suit up to that time; and that the said Defendants William Holmes and James Hopkins, John Cole Tompkins, and Henry James Parsons, should pay to the said Plaintiffs what should be taxed for such costs; and the said Court did not think fit to make any order as to the said sum of 50*l.* in the pleadings mentioned, and any of the parties were to be at liberty to apply to the Court as there should be occasion. *

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* In pronouncing the decree the Vice Chancellor gave his reasons as follows:—

It is very plain that what has been done cannot be supported. The act 9 G. 4. s. 22. directed that within six weeks after the 20th November, 1828, the trustees and managers of the different savings' banks shall ascertain the amount of their increased funds up to the 20th November, 1828, and shall, as soon afterwards as conveniently can be, after retaining so much thereof as may be necessary for or towards the future management of the bank, appropriate the same in the manner prescribed by these rules; or if no provision be made by the rules, then in such manner as the trustees or managers, or the major part of them, assembled at any general meeting to be convened according to the respective rules and regulations of such savings' banks shall think fit and proper. The first question is, what is to be inferred from the provisions of this act of parliament as to the destination of the fund in the event of the rules of the savings'

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This decree was signed by the Lord Chancellor, and inrolled.

banks not prescribing at all or affecting the question, how the surplus should be applied. Now, in order to construe that, it appears to me necessary to consider several other clauses which are contained in this act of parliament. The act directs, in the first place, that the surplus which should accrue after the 20th November, 1828, should be paid to the commissioners for reduction of the National Debt; and that section also directs that it shall be lawful for the trustees or managers to require and receive from the commissioners, for the purpose of the institution, any sum of money equal to the whole or any part of the principal monies which may have been discharged from the account of the savings' banks. Then, by the forty-sixth section, it is directed, that for the more effectually ascertaining from time to time the actual and progressive state of the several savings' banks, the trustees shall annually cause a general statement of the funds to be prepared up to the 20th November in each year, shewing the balance or principal sum due to all the depositors collectively in such savings' banks, and a statement of the expense incurred, and stating in whose hands such balance shall then be remaining. And the forty-seventh section directs that the trustees shall cause a duplicate of such annual statement, with a list of the trustees and managers of such institution for the time being, to be publicly exhibited in some conspicuous part of the office or place where the deposits of such savings' banks are usually received, for the information of all persons making deposits therein. And then it directs, in the forty-eighth section, that the commissioners shall lay accounts annually before parliament, which accounts shall be of the gross amount of all sums received and credited, including interest, and of all sums paid, including interest, from a given day to a given day. And then, by the fifty-ninth section, it is directed, amongst other things, that all accounts and returns shall be made in such form and manner, and containing such particulars, and under such regulations as shall from time to time be directed by the commissioners.

Now it appears to me that what the legislature had in view was the benefit of the parties who were the depositors in the banks; that is, so much kept in view, that, by the twenty-third section, though the surplus might have been paid over, it would

The Defendant William Holmes appealed against the order of the 26th November, 1831, so far as it

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be repaid by the commissioners to the trustees of any bank, if it were wanted for the purposes of the institution; and the account which is directed necessarily would include in it (at least the first account) the statement of what was that surplus sum which the trustees might have in their hands upon the 20th November, 1828, by reason of the accumulation, *ultra* the interest, which, according to the preceding act of parliament of 5 G. 4. was payable to the depositors. If the account must necessarily have included it, and it appears from the books of the society that the very first account which was made up, namely, the account of the 20th November, 1829, did contain an item which expressed that there was appropriated, agreeably to the rules of 9 G. 4. a certain sum, including the sum in question; and that this form was according to that which the commissioners had directed, is reasonable to be inferred from the circumstance that you have a correspondence between the trustees and the secretary to the National Debt Office, with respect to that very entry which is contained in the first account. When it is directed therefore that all accounts (and of course including the first account) should show the balance or principal sum due to the depositors, and a statement of the expense incurred, it certainly strikes me that parliament concluded that the account would contain what was due to the depositors, and a statement of the expense, and nothing else. It is assumed that no account will contain any thing except that which represents what is due to the depositors, and what has been the expense; and there is no other item whatever noticed as a thing which is to be contained in the account. That, therefore, leads me to suppose that parliament necessarily inferred that a sum of money, which was to be divisible, would in some manner or other be appropriated for the benefit of the depositors. Now, in order that every body who was concerned might know what was taking place with respect to the account, the provision in the forty-seventh section is introduced, which directs a copy of the account to be publicly fixed in some conspicuous part of the place where the deposits of such savings' banks are usually received, for the information of whom? For the information of all persons making deposits therein. I must suppose, therefore, that the account was directed to be exhibited

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directed the payment of the money into Court, and gave consequential directions, and also against the

in order that all the parties should know how these funds were applied; and the only parties who are stated as persons likely to be interested, are the persons making deposits in the bank. I must suppose, therefore, that parliament did, by this section, shew their view of the case, that the persons who would be interested in the accounts would only be the persons who were depositors therein, and not strangers. Then I find, when this account was communicated, there is a correspondence, as I said before, between the trustees and Mr. Hyam, in which Mr. Hyam requests to be informed whether the sum of 642*l.* 15*s.* 11*d.* was actually paid to the depositors in money, or whether it was merely placed to their credit. Now the question evidently shews what it was which the commissioners, or at least their secretary, apprehended to be the meaning of the act of parliament; and it is observable that the answer which is given does not state exactly what was the intention of the trustees with regard to the sum of money, but it merely answers the question in terms, and not in substance, for it answers the question by stating that the sum of 642*l.* 15*s.* 11*d.* was neither paid to the depositors in money, or placed to their credit; but it does not state how it was applied, and that answer never could have furnished the information; and when Mr. Hyam writes a second letter, and asks that the commissioners might be furnished with a copy of the warrant under which the sum of 642*l.* 15*s.* 11*d.* was appropriated; then the committee directed that the answer to be given should be, that it was appropriated under the act of 4 G. 4. c. 92. s. 22. referring only to the section; but still it does not state what was the specific purpose for which the meeting of December, 1828, had directed that the money should be appropriated. The provisions of the act lead me to infer that the legislature contemplated nothing but an appropriation, which in some manner or other should be for the benefit of the general depositors. But now I have to consider whether, in point of fact, even admitting that it might have been otherwise applied, the thing has been applied in a manner which the act of parliament authorized. It appears to me that the act of parliament evidently supposed that any appropriation which should be made would be an appropriation that would be made by virtue of a resolution made by the

decree, except as to that part of it which declared that the Court did not think fit to make any order

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trustees at a meeting as soon as conveniently could be, after the 20th November, 1828. Now what was done? There was a meeting held on the 11th December, 1828, in which it was resolved that the sum of 592*l.* should be paid over to certain persons for the purpose of paying the expences incident to the widening a public bridge; and, in case counsel should be of opinion that the trustees were not so authorized to dispose of the money, that the same be disposed of in such manner as the trustees or managers present, or the major part of them, at the annual meeting of November, 1829, shall order; that a case for the opinion of counsel be prepared and submitted to the standing committee, to be settled by them. It was part, therefore, of this resolution that the opinion of counsel should be taken upon a case which should be settled or approved of by the standing committee; and, if the opinion upon the case so stated and settled was against the application of the money to the purpose of widening the bridge, that then the fund should be applied in such manner as a general meeting, held in November, 1829, should direct. Now what was the fact? That on the 19th October, 1829, a case was presented and approved of by the committee; and my opinion is, the case having once been presented, and approved of, the resolution of the 11th December, 1828, was to be dealt with, having regard to the opinion which should be given upon that case, and the opinion that was given upon that case was against the application of the money for the purpose of widening the bridge, but what was done? The case was in effect altered by that statement which was introduced upon it after Mr. Tinney had given his opinion on the 29th October, 1829; and upon that case so altered, which altered case never was approved of by the committee (at least there is no evidence to shew that it was), Mr. Tinney gave an opinion which sanctioned the application of the money in the manner first of all proposed.

Now it appears to me that, according to the plain terms of the resolution which the trustees adopted on the 11th December, 1828, when Mr. Tinney had given his opinion on the first case (the only case approved of by the committee), they had no power whatever to do any thing else than merely to call a meeting in November, 1829, for the purpose of deciding how

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as to the sum of 50*l*. in the pleadings mentioned. The other Defendants did not concur in the appeal.

the money should be disposed of, because that was the course which the resolution of 1828 directed; but, instead of that, it does not appear that there was any meeting held in November, 1829, for the purpose of considering the subject at all; and my opinion therefore is, that according to the true construction of the resolution of the 11th December, 1828, nothing was done, nothing was resolved which would justify the trustees in parting with the fund at all. I cannot but think that, after the trustees had actually made a return to the commissioners, by that return, which is dated the 20th November, 1829, whereby they represented that there had been an appropriation (which return was made for the purpose of enabling the commissioners to make the return before parliament), they had not the power to come to the resolution which they adopted on the 20th December, 1830. The act of parliament, as I understood it, evidently contemplated that, for the purpose of letting it be known to the commissioners, by the return of the 20th November, 1829, what the account was, that the account should contain a statement of the appropriation of the fund, by reason of the resolutions which the trustees might come to at the meeting, to be held as soon as conveniently could be after the 20th November, 1828; and, if it were otherwise, the whole of the provisions of the act of parliament would be defeated: my opinion is, that the trustees did wrong. I don't say morally wrong; but they did legally wrong; they did that which the act of parliament never contemplated when they allowed the return to be made to the commissioners, therefore they had made the appropriation at a time when it shews there was no resolution made which could have justified that appropriation; in point of fact, there are no resolutions at all which, in my mind, could in the least be considered as directing what the appropriation should be, until the resolution was made of the 20th December, 1830.

It appears to me, therefore, that, upon the substance of the case, the trustees were wrong; and, upon the form of the case, they were wrong, because they did not comply with the plain provisions of the act of parliament, which in my mind meant that as soon as conveniently could be, after the 20th November, 1828, it should be decided how the money should be applied. Upon that part of the case it is quite clear that the trustees were

For the appeal the Appellant in person.

The order of the 26th November, 1831, presumed the points of law adversely to the Appellant, and prejudiced the merits which ought to have been reserved till the hearing of the cause, and there were no peculiar circumstances requiring such an order to be made before the decree. By the construction of the act 9th Geo. IV. chap. 92. sec. 22. the trustees and managers of the Arundel Savings' Bank had power to order the application of that part of the surplus which was applied by the Appellant for the purpose of widening the public

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wrong. It is no objection whatever to this suit that Mr. Henty has been made a party, because it appears to me there is sufficient evidence to justify the placing of his name upon the record, as one of the trustees. His name appears in that book as one of the trustees, and it appears, in point of fact, that he attended three meetings, and, as I understood, in the character of trustee. Neither does it appear to me that the suit is defective in respect of not having upon the record any of those persons who concurred in the resolutions which were made either upon the 11th December, 1828, or the 20th December, 1830; for the resolution was nothing; it was the application of the money, the taking it away from the funds of the society, which constituted the act of which alone the parties had a right to complain. It is in respect of that act only that the complaint is made; and the preliminary steps which regarded the resolution appear to me no more to make the parties who concurred in the resolution necessary, than it was necessary to make the actuary a party who issued the notice to get the trustees together at the meeting. It appears to me, therefore, on the substance of the case, that the Plaintiffs are right, and the trustees are wrong; and, though I admit this is a hard case, and there has been no corruption or morally improper dealing with the fund, and the thing was meant *bond fide*, my opinion is, that the matter is not to be supported in point of law; and those who would defend the case must pay the costs of the suit.

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Bridge at Arundel, and the same was duly appropriated to that purpose under their direction. If the application of the surplus under the 22nd section of the act 9th Geo. IV. chap. 92. is to be construed to mean some purpose immediately beneficial to the depositors, or to the trustees and managers, those purposes would be unlawful, and if it means any other beneficial purpose for the Bank, inasmuch as all future necessary purposes were provided for, and by the act are required to be so, the beneficial purposes contemplated must mean an application with all convenient speed to some unnecessary purposes, or else must mean some future purposes at present not necessary, in which case the whole ought to have been retained.

This suit is not rightly framed to raise the questions which have been decided by the decree, it being a suit on behalf of all the trustees and depositors except the Defendants against them, as parties acting under the orders and as the agents of the trustees and managers, the parties who complain.

The construction of the act of parliament is a doubtful question concerning the duty of trustees, and the Appellant acted under the authority of the trustees, and as their agent upon a bona fide construction of the act of parliament by the trustees, and the decree ought therefore not to have charged the Appellant personally, and in any event ought not to have been made with costs.

For the Respondents Mr. James Russell.

The appropriation of the sum of 592*l.* 15*s.* 11*d.*, to widen the bridge over the Arun, was not authorized by the trustees or managers of the Arundel Provident Bank, or the major part of them, assem-

bled at a general meeting convened according to the rules and regulations of the bank.

Such an application of the sum in question is not warranted by the sound construction of the 9th Geo. IV. c. 92.

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The Lord Chancellor.—In this case there are two questions. That which relates to the order for the payment of the money into Court is preliminary—and it is argued, that this order was contrary to the practice of the Court. It does not appear so to me. I think it was the duty of the Court to pronounce that order. The propriety of the order is apparent upon the facts stated in the answer. If the Court was of opinion, that it was money which the Defendants had no right to retain—that the claims of the Plaintiffs upon the fund might be established, it was in the ordinary course of practice to order the payment into Court. It is objected that under the authority and by a resolution of the trustees, it was paid over to the Defendants for a specific purpose and has been so applied; but this is no answer, if in the opinion of the Court the resolution and application was contrary to law. The opinion, however, and the order, is not conclusive upon the other question which involves the substance and merits of the case. The order is made only for the security of the fund.

Upon the principal question as to the application of the money, it is immaterial to the decision of the case, whether the bridge at Arundel requires widening. The question is not whether the bridge will be improved by such application, but whether the money is legally applicable. Upon this question, it is to be observed, that the fund in question

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arose from an increase and surplus of monies deposited in the Arundel Savings' Bank, which was a fund in the hands of trustees. Before the passing of the act 9th Geo. 4. c. 92. no question could have arisen as to the discretionary application of such a fund. Under all former acts and on principle, the profits arising from deposits could only be applied for the benefit of the depositors, and nothing less than the authority of an act of parliament could warrant any other application against the will of the parties. No other persons could by possibility have any right to the fund, or direct the application of it, except by contract between the parties and under their authority. There was no such contract as to this fund, and the trustees created by former acts held in trust for the depositors all the monies deposited, and all profits arising from the employment of the monies. That being the state of the law and the rights of the parties when the 9th Geo. 4. c. 92. was passed, the question in this case, arises whether they are taken away, or how far altered by that act. The accumulation in this case existed before the act; the question is whether the right of the individuals to that surplus which then was theirs is taken away, and powers given to apply it to other purposes.

The scheme of the 9th Geo. 4. c. 92. as to this surplus, appears in the 22d and 23d sections of that act. It was provided, that from that time the surplus of funds deposited to be ascertained according to the directions of the act, should be paid over to the Commissioners of the National Debt, who should hold it subject to the public undertaking to pay it or any part of it as provided

by the act upon the claim of the trustees. But it was thought unjust to apply such a provision to the times which preceded the act; because, those who had before made their deposits, did so upon the faith of laws established by previous acts of parliament or contracts among themselves. Those who deposited afterwards were aware of the law. As to those previous deposits, the act provides by the 22d section, that “ within six weeks after the 20th of “ November, 1828, the trustees and managers of “ the Savings’ Banks already established, shall as- “ certain the amount of the increased stocks or “ funds of their respective banks up to that date, “ and after retaining so much as may be necessary “ for the future purposes and management of the “ respective banks, appropriate the same in the “ manner provided for by their respective rules and “ regulations made before the passing of the act, “ or in the event of no provision having been made “ by such rules and regulations then in such man- “ ner as the trustees or managers, or the major “ part of them assembled at a general meeting to “ be convened according to the respective rules “ and regulations of such Savings’ Bank shall think “ fit and proper.”

The second rule of this Society prohibits the application of any part of the fund for the benefit of the trustees, or any person having control in the management of the institution. If then, as it appears they would be liable for the repairs of the bridge, or derive a benefit from its improvement, the application to such purpose was not according to the then existing rules of the institution, as the act directs that it should be. It has been contended by the Appellant that the surplus upon all

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deposits made previous to the 9th Geo. 4. c.92. are to be in the discretion of the trustees to apply to any meritorious purpose in any part of the kingdom, where there is no express direction by existing rules as to its application. But considering the words in the 22d section of the act, together with the second rule of the Society, it appears to me that their discretion could not be exercised directly or indirectly for their own benefit, which is the result of their resolution and the consequent application of the fund. If your Lordships should concur with me in this view of the case, the principal question before the House will be disposed of.

But it was then pressed upon the House by the Appellant, that the costs of the suit ought not to be borne by him in a case where he had applied the fund under the order of the trustees, and if the Appellant had so applied it in the execution of his duty without notice of his risk, or complaint of such appropriation, it might have been a case of hardship, and although it might have been no answer to a claim of the depositors, it might have raised a ground of question as to the costs. But, the Defendant, as it appears, took a bold course. Upon this point it is necessary to look at the answer. It is thereby admitted, that the Appellant at a meeting of the trustees, proposed the application of the surplus to the purpose of widening the bridge at Arundel, and a resolution to that effect was passed; but upon the suggestion of one of the trustees that the application might be illegal, it was agreed that a case should be stated, and an opinion of counsel taken upon the subject. This was accordingly done, and the opinion was adverse to the legality of the application. But the Appellant

thinking the opinion wrong, stated an amended case and obtained a favourable opinion.

The first opinion given by Mr. Tinney was certainly entitled to great consideration and ought to have put the parties on their guard. It was a very decisive opinion without qualification, that the proposed application was illegal. The opinion also distinctly points out the ground of objection, viz. that the trustees were probably liable to contribute to the repairs and even the widening of the bridge, in and near Arundel, and would receive benefit from the proposed application, contrary to the second rule, and indeed contrary to the acts 9th Geo. 4. c. 92., and 57th Geo. 3. c. 180. The opinion also points out that the Society having been established under the latter act, an application wholly foreign from the objects of the Society would have been questionable, as the act contemplates societies established only for the benefit of the depositors, and although repealed and a discretionary power of application given to the trustees, so that they do not derive benefit from the appropriation — yet that the trustees ought to consider whether an application not beneficial to any of the depositors was a proper appropriation of the surplus of the depositors' fund. The case was then amended, by stating that the trustees were not liable to widen the bridge, and that the trustees being depositors, a distribution of the surplus among them would be in direct violation of the second rule, as they would derive benefit: but this is a mistake; the benefit to be guarded against relates to them not as depositors but as trustees. The amended case goes on to state, that no English coin could be found small enough to repay the difference to any of the trustees for the benefit they

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would derive from the proposed application, and that the application of the fund to the discharge of the National Debt would be also for the benefit of the trustees. But the question does not turn on the benefit or amount of benefit which is to be derived from the employment of the money.

It seems that the Appellant, who had a duty to perform as trustee, was, at the time in question, mayor of Arundel, and had an apparent interest in the improvement of the bridge. In the joint answer this passage occurs: — “ This Defendant, “ William Holmes, was, in October, 1830, elected “ mayor of Arundel, and that the mayor of Arundel for the time being is bridge-warden, and “ always has the superintendence and management “ of the said bridge, and repairs said bridge from “ two sums of money, one of 2*l.* per annum, payable “ by the owner of a certain house in and adjoining “ the High Street and Farrant Street in Arundel, “ now belonging to Mr. Thomas Mansfield Halliday, of Petworth; and the other of 3*l.* payable “ annually by the owner of another house situate “ near the bridge, in Arundel aforesaid, belonging “ to his Grace the Duke of Norfolk; and if these “ sums are not sufficient, then the deficiencies have “ been for many years past paid for the repair of “ said bridge by the overseers of the parish of “ Arundel, either to the bridge-warden or to the “ persons to whom the bills may be owing for the “ repair thereof.” Then “ they admit that they “ are either occupiers or owners of property in the “ parish of Arundel, as well as in the rape of “ Arundel, and out of said parish of Arundel, and “ in other parts of the county of Sussex; (that is “ to say,) Defendant William Holmes owns pro-

“ perty of the annual value of 250*l.*, and occupies
 “ property of the annual value of 50*l.* in said parish
 “ of Arundel, and owns property of the annual
 “ value of 500*l.* in said rape of Arundel, not being
 “ in said parish of Arundel, and occupies property
 “ of the annual value of 100*l.* in said rape of
 “ Arundel, not being in said parish of Arundel,
 “ and owns property in the county (including the
 “ rape and parish of Arundel) of the annual value
 “ of 752*l.* 10*s.*”

The answer then sets forth the interest of the other Defendants. Being, therefore, an owner of property, and liable to be rated for the repairs of the bridge, it may be assumed that he felt some interest, and naturally a disposition to apply, to a beneficial purpose, money which seemed to belong to nobody; and, upon obtaining the second opinion of Mr. Tinney, the resolution for the appropriation of the fund to the improvement of the bridge was adhered to. The second opinion, retracting the objection stated in the first, proceeded upon the assurance and assumption that the trustees were not liable to the expense of widening the bridge, that the mere public accommodation (by widening it) was not a personal benefit to the trustees, within the meaning of the acts and rules, and that the act 1 Geo. 4. c. 83., which required an appropriation for the benefit of the depositors being repealed by the new act, which made the power general, the application need not be for the benefit of the depositors. Mr. Tinney's doubt was removed and his opinion changed, but, at all events, two opinions were before the trustees opposite to each other, and, in such a case, no prudent man would have acted as a trustee, especially where the counsel, giving the opinions,

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considered the question as one of doubt and difficulty. Besides this, the opinion of another counsel having been taken, which agreed with Mr. Tinney's first opinion, being adverse to the legality of the appropriation, was produced by the Respondents, at a general meeting of the trustees, and a protest made by them against the application of the fund to the widening of the bridge; but the Appellant said they had got the money, and the Respondents might recover it as they could. Notwithstanding these difficulties the Appellant, and those who acted with him, did not think fit to take any further opinion. They adhered to and confirmed their former determination, resolving to proceed in the dark. They were informed that the new opinion was adverse to their proceeding, yet they determined to take no other advice. At this time they were fully aware of the doubts and difficulties upon the question.

The bill was filed on the 1st of March, and on the 9th of March the money, being then in the hands of the trustees, was applied to and expended in the improvement of the bridge. It is possible they might have acted upon good motives and from a desire to effect a public benefit; but they cannot say they did it in ignorance of what might be the consequence. Costs are not given in Courts of Justice by way of punishment, nor are they intended as any moral degradation. The question for the Court is generally, which party shall pay. The Plaintiffs have obtained the judgment of the Court of Chancery, and have shown that the Appellant acted upon an erroneous view of the law, knowing his conduct to be at least of a doubtful character. Ought the Plaintiffs or Respondents to pay for this? If the

Appellant does not, they must. In my opinion justice would not be done if the Respondents were not indemnified ; and this principle applies equally, if not more forcibly to the appeal, because the doubts and remonstrances of the Respondents have been confirmed and sustained by the judgment of the Vice Chancellor and the Lord Chancellor. I move your Lordships to affirm the judgment with costs.

Judgment affirmed.

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IRELAND.

(EXCHEQUER CHAMBER.)

The Right Rev. NATHANIEL,
Lord Bishop of MEATH,
and the Rev. JAMES
ALEXANDER, Clerk, } *Plaintiffs in Error.*

The Most Noble CHARLES, } *Defendant in Error.*
Marquis of WINCHESTER,

Upon a bill of exceptions to the admission and rejection of evidence and the directions of the judge, the following points were decided on a writ of error:

1. In *Quare impedit*, to recover the presentation to the church of K., the advowson whereof was claimed to be part of the temporalities of the Bishop of M., the following documents were produced in evidence, viz., a deed, dated in 1637, granting to D. the next avoidance of the church of K., and a case dated in 1695, stated for the opinion of the counsel, on the part of A., then Bishop of M., containing a statement that in 1637 C. granted to D., then incumbent of the church of K., the next presentation thereto; and that in 1642 both rectory and vicarage being void by the death of D., his widow and executrix presented *pro hac vice* B. to both, who was instituted by the Bishop, and inducted by his successor. The deed and case were found by W. among books which W. stated to be visitation books and other papers of the diocese of M., in a house inhabited by a person of the same family name as A., Bishop of M., and which was stated in evidence to be the family house of A., and where his papers were kept. The documents so found were handed by W. to S., who delivered them over to C., by whom they were produced. C. was a descendant of Bishop A., but had never seen these documents in the house, nor any papers of the family, or relating to the diocese. The proofs as to the custody being in some respects equivocal, on the examination in chief, were so left without cross-examination. It was proved that there was no registry of ecclesiastical or other records in the registry office of the diocese of M. anterior to 1717.

Held that the deed and case were admissible in evidence on

behalf of the Plaintiff, against a successor of the Bishop in the see of M.

2. By Letters Patent 9 Edw. 4. the advowson of the rectory and vicarage of K. was granted to W. Bishop of M. and his successors. By an act of parliament 10 Hen. 7., reciting the necessity of protecting the King's subjects in Ireland, and reducing the land to obedience, and the diminution of the revenues by improvident grants, "to divers persons, such as "for the most part do full little service to the common weal, "for lack of which revenues the land could not be defended "for the destruction of the Irish enemies," it was enacted that all manors &c., advowsons of churches, &c., whereof the King or any of his progenitors Kings of England were at any time seised in fee simple or fee tail from the last day of the reign of Edw. 2. to this present act &c., by any letters patent under the great seal of England or Ireland to any person or persons by whatsoever name, &c., be resumed, revoked, annulled and deemed void, and of none effect &c. But the manor of R. was, by a document annexed to the act, excepted.

Held that the grant of Edw. 4. was avoided by the act of Hen. 7., and that the advowson was by the statute re-appended to the manor.

To a count in the declaration in *Quare impedit* stating the title of the Plaintiff, and that the advowson was appendant to the manor of R., the Bishop by his pleas asserted a seisin of the advowson in gross in right of his see, and traversed the appendancy of the advowson to the manor, and the title of the Plaintiff. The clerk's pleas were in substance the same. On these pleas, issue being joined, a fine levied by B., in respect of whose estate the Plaintiffs claim is not admissible in evidence upon such issue, and, if received ought not to be left to the jury to say whether it barred the action of *Quare impedit*; and, held, that it did not bar the action.

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THIS was a Writ of Error brought by the Plaintiffs in error, who were Defendants in the original cause, to reverse a judgment of the Court of Exchequer Chamber of Ireland affirming a judgment of the Court of Common Pleas in Ireland, by which it was adjudged that the Marquis of Winchester, the Plaintiff in the original cause,

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should recover his presentation to the church of Killucan, otherwise Rathweir, situate in the diocese of Meath and county of Westmeath.

On the 15th day of February, 1828, the benefice of Killucan, otherwise Rathweir, became vacant by the death of the Reverend Henry Wynne, the late incumbent thereof; whereupon the Marquis of Winchester, the Defendant in error, claiming the advowson as trustee for the Marquis of Clanricarde, presented his clerk, the Reverend Cecil Crampton, to the Bishop of the diocese of Meath, one of the Plaintiffs in error, as a fit and proper person to be admitted, instituted and inducted into the same. The Bishop of Meath refused to admit the presentee of the Marquis of Winchester, and collated to the vacant benefice, being the rectory and vicarage of Killucan, his son, the Reverend James Alexander, the other Plaintiff in error.

The Marquis of Winchester thereupon brought his action of *Quare impedit* in the Irish Court of Common Pleas against the Plaintiffs in error, as of Michaelmas term in the year 1828; and upon the return of the writ of *distringas*, being the last stage of process, the Bishop of Meath appeared by his attorney; but the other Defendant, instead of appearing to any of the writs which had been successively served upon him, cast an essoin, which, upon the application of the Plaintiff below, was quashed by order of the Court of Common Pleas; and the Defendant, the Reverend James Alexander, was ultimately compelled to appear.

The Plaintiff's declaration contained six counts; but as the verdict for the Defendant in error was taken upon the fifth count only, it is not necessary

further to advert to the other counts of the declaration or the pleas thereto.

By the fifth count of the declaration the Plaintiff, after setting forth the pedigree of the house of Clanricarde, from the first to the fourth Earl of the family, stated that Rickard, the fourth Earl of Clanricarde was in the year 1626 seised in his demesne as of fee of and in the manor of Rathweir, with the appurtenances, in the county of Westmeath, to which the advowson of the church of Killucan, otherwise Rathweir, was appendant; and that being so seised, he the said Rickard, Earl of Clanricarde, on the 12th of April, 1626, presented to the said church Doctor Edward Donnellan, his clerk, who was on such presentation admitted, instituted and inducted into the said church: that upon the death of the said Earl in the year 1635, his eldest son and heir-at-law, Ulick, the fifth Earl of Clanricarde, became seised of the said manor of Rathweir, and the said advowson appendant thereto. The count then stated the rebellion in Ireland in the year 1641, and that by reason thereof the manor of Rathweir, with the advowson appendant, were, with the other possessions of the Earl of Clanricarde, seized and sequestered into the hands of the Crown. The pedigree of the Clanricarde family is then deduced to Rickard, the sixth Earl of Clanricarde, and heir male of the body of Ulick, the first Earl of Clanricarde.

The count proceeds to state that by letters patent, bearing date the 8th day of April, in the fourteenth year of the reign of his late Majesty King Charles II., his said late Majesty granted unto the said Rickard, sixth Earl of Clanricarde, (amongst other properties of which Ulick, the fifth

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Earl had been seised in the year 1641,) the manor of Rathweir, with the advowson appendant thereto, to hold to the said Rickard and the heirs male of his body, with remainder to the heirs male of the body of Ulick, first Earl of Clanricarde, remainder in fee to the heirs of the said Ulick, first Earl of Clanricarde.

That by the statute made in Ireland in the fourteenth and fifteenth years of the reign of his said Majesty King Charles II., commonly called the Act of Settlement, the said letters patent were fully confirmed.

That upon the death of the said Rickard on the 10th of August, 1666, without issue male, his only brother, William, seventh Earl of Clanricarde, as heir male of the body of Ulick, the first Earl of Clanricarde, became seised in fee tail of the manor of Rathweir, with the advowson of Killucan appendant thereto; and being so seised, the said William, Earl of Clanricarde, by indenture made on the 2d of May, 1670, conveyed to Sir Patrick Mulledy and his heirs the said manor of Rathweir; expressly excepting and reserving to him the said Earl, and the heirs male of his body, the advowson of the said church of Killucan, whereby the said Sir Patrick Mulledy became seised of the manor of Rathweir; and the said William, Earl of Clanricarde continued to be seised in tail male of the said advowson, which thenceforward became an advowson in gross.

That William the seventh Earl being so seised of the advowson in gross, died on the 10th day of October, 1687, leaving Rickard his eldest son, eighth Earl of Clanricarde, who thereupon became seized in fee tail of the advowson.

The count then set forth the act of parliament, made in Ireland in the second year of the reign of her late Majesty Queen Anne, intituled "An Act " to Prevent the further Growth of Popery ; " whereby the advowsons of Roman Catholics became vested in the Crown, until conformity, as therein provided.

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That Rickard, the eighth Earl of Clanricarde, being so seized of the advowson, died on the 6th of April, 1708, without issue, leaving John, who thereupon became ninth Earl of Clanricarde, his brother and heir at law. That John, ninth earl, being a Roman Catholic, the advowson in gross became vested in the Crown, under the said act of parliament, until such conformity as thereby directed. That John the ninth Earl died in 1722, leaving Michael his son and heir at law, who became tenth Earl of Clanricarde, and who duly conformed to the Protestant religion ; whereupon the advowson of Killucan became revested in him in tail male. That on the 28th day of November, 1726, Michael the tenth Earl died, leaving John Smyth, his eldest son, who thereupon became eleventh Earl of Clanricarde, and seised in fee tail of the advowson of Killucan.

The count proceeds to state that, by a private act of parliament made in England, in the tenth year of the reign of his late Majesty King George III., the said advowson was, amongst other things, limited to the use of the said John Smyth, eleventh Earl of Clanricarde, for the term of his natural life, with remainder to his eldest son Henry, Lord Dunkellyn, for his life ; remainder to the first and other sons of the said Lord Dunkellyn, in tail male ; with remainders over, and the reversion in fee to

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the said John Smyth, eleventh Earl of Clanricarde : and by the said last mentioned act of parliament the said Henry Lord Dunkellyn was empowered to appoint a jointure, chargeable upon said settled estates, in favour of any woman with whom he should intermarry, and to limit and create a term of years for securing the due payment of such jointure. It then states the death of John Smyth, the eleventh Earl, in the year 1782, leaving the said Henry, Lord Dunkellyn, his eldest son, who thereupon became twelfth Earl of Clanricarde, and seised for the term of his life of the advowson in gross.

The count then alleges that Henry, twelfth Earl being so seised and empowered, in the year 1785 intermarried with Urania Anne Paulett (now the Dowager Marchioness of Clanricarde); and that by deed, bearing date the 15th day of March, 1785, and made before and in contemplation of the said marriage, the said Henry, twelfth Earl of Clanricarde, by virtue and in exercise of the said power, limited and appointed to the use of the said Urania Anne, a jointure of 2000*l.* per annum, charged upon said settled estates; and also thereby limited, appointed, and demised unto Henry Penruddock Wyndham, and the said Marquis of Winchester, amongst other things, the said advowson of the church of Killucan for a term of five hundred years, for the better securing to the said Urania Anne the due payment of the said jointure of 2000*l.* That the said Henry, twelfth Earl of Clanricarde, who was afterwards Marquis of Clanricarde, died on the 10th of May, 1797, leaving the said Urania Anne Marchioness of Clanricarde, his widow, him surviving (and who is still living).

That the said Henry Penruddock Wyndham, and the said Marquis of Winchester, being possessed (amongst others of the said settled estates) of the said advowson for the said term of five hundred years, the said Henry Penruddock Wyndham died on the 1st of May, 1810, leaving the said Marquis of Winchester, the now Defendant in error, him surviving, and sole possessed of the said advowson for the residue of the said term of five hundred years, and intituled to present a fit and proper person to the said church of Killucan, when the same became vacant by the death of the said Reverend Henry Wynne, the last incumbent thereof, on the 15th of February, 1828.

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To this fifth count of the declaration the Bishop of Meath, one of the Defendants below, pleaded thirteen pleas: by the first of said pleas the said Bishop traversed the appendancy of the advowson to the manor.

Secondly. The seisin of Rickard, fourth Earl of Clanricarde, of the manor with the advowson appendant.

Thirdly. The admission and institution of Edward Donnellan on the presentation of Rickard, fourth Earl of Clanricarde.

Fourthly. The seisin and sequestration of the manor and advowson to the use of King Charles II.

Fifthly. The grant of the manor, with the advowson appendant, by King Charles II., to Rickard sixth Earl of Clanricarde.

Sixthly. He pleaded *nul tiel* record of the letters patent of the 8th April, 14th of Charles II.

Seventhly. He traversed the grant of the advowson by John Smyth, Earl of Clanricarde, unto

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Eaton Stannard and Robert French, by a deed bearing date the 25th of May, 1745, mentioned in the fifth count of the declaration, and thereby stated to have been lost, but not material to be further adverted to.

Eighthly. He traversed the loss of the said deed of the 25th of May, 1745.

Ninthly. He pleaded *nul tiel* record of the Act of Parliament 10th of George III.

Tenthly. He traversed that Henry, Earl of Clanricarde, did by the deed of the 16th of March, 1785, limit, appoint, and demise the advowson to Henry Penruddock Wyndham and the Marquis of Winchester.

Eleventhly. That the deed of the 16th of March, 1785, was made and is lost.

Twelfthly. That the Marquis of Winchester is possessed of the advowson.

Thirteenthly. He pleaded a grant by his late Majesty, King Edward IV., on the 9th of January, in the ninth year of his reign, of the said advowson in gross to William, then Bishop of Meath, and his successors; and that on the 12th day of April, 1626, Edward Donnellan was collated to the said church by Anthony, Bishop of Meath, in right of his said bishoprick, and traversed that the said Edward Donnellan was admitted to the said church on the presentation of the said Rickard fourth Earl of Clanricarde.

The Reverend James Alexander, the other Defendant below, pleaded eight pleas to the said fifth count of the declaration.

The first, second, third, fourth, sixth, and eighth, of the clerk's pleas correspond with the first, second, third, fourth, ninth, and twelfth, of

the Bishop's pleas. He further traversed the seisin of Michael, tenth Earl of Clanricarde.

And, that it belongs to the Marquis of Winchester to present a fit person to the said church.

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The eleventh plea of the Bishop to the fifth count of the declaration having been so framed as to render it impossible for the Plaintiff below safely to take issue thereon, he was compelled to demur thereto; and the Bishop having joined in demurrer the same was argued in the Irish Court of Common Pleas, and judgment had thereon in favour of the Plaintiff below.

Issue being joined upon the other pleas, the cause was tried at the bar of the Court of Common Pleas in Ireland, and before a special jury of the county of Westmeath, on the 15th day of November, in the year 1830.

To maintain the said issues on the part of the Plaintiff below, the substance of the proofs adduced was as follows:—

It was shown that King Edward II. being seized of the manor of Rathweir with its appurtenances, granted the same, together with all advowsons of churches thereunto belonging by letters patent, bearing date the 6th of April, in the 9th year of his reign, to John d'Arcy and Johanna his wife, in tail male: and it appeared by the enrolment of a writ issued on the 21st of July, in the fifth year of the reign of King Edward III., ordering the justices of Ireland to cause an extent of the said manor to be made, and also by the enrolment of an extent of the said manor made in pursuance of said writ, at Drogheda, in the fifth year of the reign of King Edward III., that there then was in the

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said manor a certain parish church, the patronage of which belonged to the said manor. There was further shown by an entry in an ancient book remaining of record in the registry office of the diocese of Armagh, the presentation by Sir William d'Arcy of one Dermott Martin to the rectory of the parish church of Rathweir, on the 13th of March, 1509, therein stated to be then vacant by the death of Thomas d'Arcy, the last incumbent thereof. An inquisition taken before the Barons of the Exchequer of Ireland, at Dublin, in the twenty-third year of the reign of King Henry VIII. was also shewn, whereby, amongst other matters, it was found that the said King Henry VIII. was seised of the said manor with its appurtenances; and there was further shown the enrolment in the Rolls' Office of the High Court of Chancery in Ireland of a presentation by King Henry VIII., dated the 18th of August, in the twenty-fourth year of his reign, of one William Cocks to the said church of Rathweir, being then vacant, and to the donation of the said king belonging.


It was further shown, that King Henry VIII., by his letters patent bearing date at Westminster, the 16th of August, in the twenty-sixth year of his reign, granted the said manor of Rathweir, with its appurtenances, together with the advowsons of churches, to one John D'Arcy and his assigns for life, at the rent of twenty marks; and by letters patent, bearing date at Westminster the 29th of October, in the fourth and fifth years of the reign of King Philip and Queen Mary, reciting the said life estate of the said John D'Arcy, in the said manor of Rathweir with its appurtenances; also the Crown's reversion in the same after the death

of the said John D'Arcy, the said king and queen granted to Gerald, Earl of Kildare, and Mabella, his wife, and to the heirs male of the body of the said Earl, the reversion of the said manor of Rathweir with its appurtenances, and all advowsons and right of patronage of churches thereto belonging, or in any manner whatsoever appertaining.

It further appeared, that by letters patent of King James I., bearing date, at Dublin, the 30th of October, in the first year of his reign, after reciting the said last-mentioned patent of King Philip and Queen Mary, and reciting that said Gerald, Earl of Kildare, was dead without issue male, the said King James I. granted and confirmed unto one John King all his reversion in the said manor of Rathweir, with its appurtenances, and all advowsons and patronage of churches in any manner belonging or appertaining to the said manor, as fully as he the said King James, or any of his progenitors had enjoyed the same, to hold to the said John King, his heirs and assigns for ever.

The Plaintiff below also produced an attested copy of a fine, bearing date on the morrow of the Purification, in the fourth year of the reign of King James I., and levied by the said John King, and Catherine his wife, to Rickard Burke, fourth Earl of Clanricarde, of the manor of Rathweir, with all advowsons, rectories or rights, patronage and other appurtenances to the said manor belonging; also a copy of the enrolment from the Rolls' Office of Chancery of a king's letter, bearing date the 8th of April, in the sixth year of the reign of King James I., directing the acceptance from Rickard, fourth Earl of Clanricarde, of a

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surrender of all his manors and temporal and spiritual hereditaments in Ireland; and that a new grant of the same should be made by letters patent; and that a commission should issue under the great seal of Ireland to inquire as to the same; and also an inquisition taken at Athlone, on the 4th of May, 1609, pursuant to said commission, finding that the said Rickard, Earl of Clanricarde, was then peaceably seised in his demesne as of fee of the manor of Rathweir with its appurtenances, by purchase from John King, as appeared by deed of bargain and sale, dated 1st January, 1606, and of all advowsons of churches and vicarages in any manner belonging to the same; and as also appeared by the exemplification of the said fine; and also letters patent, dated, at Dublin, the 19th of July, in the eighth year of the reign of King James I., whereby he granted and confirmed to Rickard, fourth Earl of Clanricarde, the manor of Rathweir, with all its rights, members, and appurtenances, and hereditaments, as fully and amply as the same ever came or ought to have come to the Crown by any legal means whatsoever, to hold to the said Rickard, fourth Earl of Clanricarde, and his heirs and assigns for ever.

And the Plaintiff further produced and proved a duly attested and compared copy of the letters patent mentioned in the fifth count of the declaration, and dated at Westminster the 8th of April, in the fourteenth year of King Charles II., and confirmed as hereinbefore stated by the Act of Settlement, granting, amongst other things, the said manor, and all rectories and advowsons of churches whatsoever in Ireland, which Rickard, fourth Earl, or Ulick, Marquis of Clanricarde, was

possessed of by any title or any claim, to Rickard, sixth Earl of Clanricarde, and the heirs male of his body; remainder to the heirs male of the body of Ulick, first Earl of Clanricarde; remainder to the right heirs of the said Ulick.

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The pedigree of the Earls of Clanricarde, as stated in the fifth count of the declaration, was admitted by the Defendants below; and also that there had been a conveyance of the manor of Rathweir to Sir Patrick Mulledy, and that he or the persons deriving under him had forfeited, and that all their property had vested in the Crown under the Act of King William the Third.

The Plaintiff below also produced from amongst the papers of the present Marquis of Clanricarde two deeds; one bearing date the 4th of March, 1699, whereby Rickard, then Earl of Clanricarde, conveyed to John Morgan of Monksfield, in the county of Galway, Esquire, and his heirs, upon trust, the advowsons and rights of presentation to churches of the Clanricarde family; and the other bearing date the 27th of March, 1744, purporting to be a reconveyance by John Morgan of Kilcolgan, in said county of Galway, to John Smyth, Earl of Clanricarde, of the said advowsons; and, amongst others, the advowson or right of patronage of, in, and to the rectory and parish church of Rathweir and Killucan, in the county of Westmeath.

And the Plaintiff below produced and gave in evidence an attested copy of the private act of parliament in the fifth count of the declaration, mentioned to have been made in the tenth year of the reign of King George III., and vesting the settled estates of John Smyth, Earl of Clanricarde,

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in the kingdom of Ireland, in trustees to the uses therein mentioned, discharged of the trusts contained in the deed of 25th of May, 1745; and by which act the power mentioned in the said fifth count was vested in Henry, then Lord Dunkellyn, the eldest son and heir of the said John Smyth, Earl of Clanricarde, to charge the said settled estates with a jointure of 2000*l.*, and to secure the same by a trust term, as in the said count mentioned; and also the original memorial of a deed dated the 16th of March, 1785, whereby the said Henry, Lord Dunkellyn, upon his intermarriage with Urania Anne Paulett, the present Marchioness Dowager of Clanricarde, exercised his said power of charging his said estates (including said advowson) with said jointure of 2000*l.*; and by which, for securing the payment of said jointure, he the said Henry, Lord Dunkellyn, created and vested a term of 500 years in the same, in the said Henry Penruddock Wyndham and the said Marquis of Winchester, and which said term then was and still is vested in the said Marquis of Winchester, he having survived his said co-trustee, the said Henry Penruddock Wyndham.

The evidence relied upon by the Plaintiff below, with respect to seisin of the advowson, or the exercise of the right of patronage, to the rectory and vicarage of Killucan, was as follows:—

1. An attested copy of a royal commission, bearing date the 22d of June, in the fifteenth year of the reign of King James I. to inquire, amongst other matters, by whom the several parsonages, vicarages, and other spiritual livings, then were and had been held and enjoyed, and a duly compared and attested copy of an

entry in the regal visitation-book of the year 1615, being the return to said commission in the words following: "1615. Rectoria de Rathweir, "alias Killuken, comes Clanricarde, patronus: "dicta rectoria valet per annum, 200*l*.; Marg^r. "Johannes Carter, clericus, in artibus Mag^r., "verbi divini predicator, rector. Vicaria de Rath- "weir, alias Killucken, ecclesia et cancel. reparat. "comes de Clanricarde patronus; dicta vicaria "valet per annum 40*l*. Mag^r Nicholas Robinson, "clericus, verbi divini predicator, vicarius; M^r. "Jacobus Byram, clericus, in artibus bachalarius, "verbi divini predicator, curat." Also an entry in the book containing returns of institutions and collations by the archbishops and bishops of Ireland remaining of record in the First-Fruits Office in his Majesty's Court of Exchequer, showing by certificate of Anthony, Bishop of Meath, dated the 28th of April, 1627, that Edward Donnellan was admitted to the rectory and vicarage of Rathweir: and by certificate of Arthur, then Bishop of Meath, dated in 1743, that one Peter Warburton was instituted on the 13th of February, 1741, into the rectory and vicarage of Rathweir: also an entry in the regal visitation-book of 1633, whereby it appeared that Mr. Edward Donnellan was then rector and vicar of the said rectory and vicarage.

2. An attested copy from the book of commissioners in the Vice Treasurer's office of Ireland, of a commission of the Commonwealth of England, dated Dublin, 19th August, 1653, directing inquiry by the Commissioners of Revenue, by examination of witnesses on oath, among other things, "of all manors, rectories, and other "hereditaments, who owned same upon the 23d

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“ of October, 1641, and who now enjoy or claim
 “ the same; and what estate in the same was en-
 “ joyed or claimed in 1641, and what now.” And
 an attested copy of the original return to the said
 commission, dated Athlone, 7th November, 1653,
 for county Westmeath, now remaining of record
 in the said Surveyor-General’s office, finding upon
 oath, “ that the parsonage and vicarage of the
 “ parochial church of Killucan was on the 23d of
 “ October, 1641, held by Edward Donnellan,
 “ clerk and parson of the same by virtue of the
 “ presentation of the Earl of Clanricarde, patron
 “ thereof, and by the admission of the ordinary.”


By the examination of three witnesses, namely,
 Anthony Dopping, John D’Arcy, and Sir William
 Betham, the Plaintiff below proved the finding
 at Lowton House, in the county of Meath,
 of two documents; one a parchment deed bearing
 date the 28th day of March, 1637, and purporting
 to be a grant of Ulick, fifth Earl of Clanricarde, to
 Doctor Edward Donnellan of the then next avoid-
 ance of the rectory and vicarage of Rathweir,
 otherwise Killucan; and the other dated 28th of
 February, 1695, and purporting to be a case stated
 for the opinion of counsel on the part of the said
 Anthony Dopping, Bishop of Meath, wherein it
 was, among other things, stated on the part of the
 said Bishop, “ that in the year 1637, Ulick, Earl of
 “ Clanricarde, granted to Doctor Donnellan, in-
 “ cumbent of Rathweir, his executors and admi-
 “ nistrators, the next presentation to the rectory
 “ and vicarage of Rathweir, dated the 28th March,
 “ 1637; that in 1642, both rectory and vicarage
 “ being void by the death of Doctor Donnellan,
 “ his widow and executrix, presented *pro hac vice*
 “ tantum William Barry to both, who was insti-

“tuted by the bishop June 13th 1642, but not
 “inducted till the 27th February, 1660; and
 “that, by a mandate from the Bishop’s successor,
 “the bishop that instituted being dead before
 “William Barry’s induction.”

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The documents were produced by Anthony Dopping, who deposed that he was a descendant of Anthony Dopping, Bishop of Meath, and that he had in his possession several papers which were handed to him as coming from Lowton House, where the Dopping family papers were kept, that Lowton House is the family mansion of the Doppings, and that the papers in his possession were handed to him by John Darcy, who is a relation of the Dopping family, and that the two documents were handed to him among the said papers by John Darcy at a Major Sirr’s, and that he never saw the said two documents or any of them at Lowton House. John Darcy deposed that he handed a parcel of papers to Anthony Dopping, the last witness, and that he got the said parcel of papers from Sir William Betham. Sir William Betham deposed that he found a parcel of papers at Lowton House among other papers, and that the Reverend Mr. Sirr was with him, that he found the said parcel of papers in a room with other papers relating to the see of Meath, and that he handed the said parcel of papers to the said Mr. Sirr; that Lowton House belonged to or is inhabited by a Mrs. Dopping, a middle aged lady, and that he put no mark on the said parcel of papers, but that he took copies of them; and the two documents produced were among them; that at the time of finding the said parcel of papers he found several visitation books of the diocese of Meath, particularly one of the year 1616. By the

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evidence of the Rev. G. Brabazon, the registrar of the diocese of Meath, it appeared that there was no registry of ecclesiastical or other records of the diocese of Meath (except one old roll) anterior to the year 1717, and that no visitation-books of the diocese, or entries of presentations, admissions, institutions, or collations to ecclesiastical benefices within the diocese, or other papers or records relative to the diocese, or the benefices within the same, were preserved or to be found in the said registry office, relating to any period anterior to the year 1717.

To the admission of these documents (the grant and case) in evidence and the directions of the Court exceptions were taken on the part of the Defendant, the substance of which is set forth in the errors assigned in the Exchequer Chamber, and in parliament as after stated.


The Defendants below having relied upon the grant of King Edward IV. to William Sherwood, Bishop of Meath, stated, in the thirteenth plea of the Defendant the Bishop, the Plaintiff below (protesting against the validity of said alleged grant, and further insisting that it had not in a single instance been acted upon) relied upon its total extinction, (if it ever had valid existence,) by the act of resumption of the tenth of King Henry VII., which was given in evidence on the part of the Plaintiff below; and by which, for the reasons and considerations therein contained, it was ordained and enacted, and established by the authority of the then parliament, "that there be resumed, seized, and taken unto the said King's hands, amongst other things, all manors, lordships, castles, advowsons of churches, free chapels, lands, tenements, rents, services, fee farms, and all other

manner of profits, hereditaments, and commodities, whereof the said sovereign lord, or any of his noble progenitors, kings of England, was at any time seised in fee simple or fee tail, from the last day of the reign of King Edward II. to the passing of the said act; and by the same authority all manner of feoffments, gifts, intails, grants, leases for term of lives, or term of years, releases, confirmations, and reversions, of all and every or the aforesaid honours, manors, lordships, and of all others as before specified, or of any parcel of them, as well by authority of parliament, as by any letters patent made under the Great Seal of England or Ireland, to any person or persons, or by whatsoever name or names, they be named jointly or severally, from the said day to be resumed, revoked, annulled, and made void, and of none effect in law.

The evidence on the part of the Defendants below (the now Plaintiffs in error) consisted of the following documents.

An attested copy of a king's letter or mandate, bearing date the 8th day of July, 1354, in the twenty-eighth year of the reign of King Edward III. whereby, after reciting that the judgment against Roger De Mortimer, Earl of March, had been annulled as erroneous, the said King Edward III. commanded that the rolls' memoranda and muniments, which belonged to the said Earl, and which were in the treasury of the Exchequer, should be delivered over by the treasurer and barons of the Exchequer to Roger de Mortimer, then Earl of March, cousin and heir of the said late Earl, or his attorney in that behalf; to which letter a memorandum is attached, of the delivery of certain rolls pursuant thereto, to the treasurer of the said Earl.

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good and valid grant at the time of the making thereof, and had rendered the advowson for ever disappendant and in gross, and that it never again became appendant to the said manor, and did not pass to the said John King by the letters patent of the first year of King James I.

That the Court ought not to have told the jury, that although they should believe that King Edward IV. was seised of the manor, and had made such grant of the advowson to the said Bishop Sherwood, yet that the said advowson had again become appendant to the manor by force of the act of the 10th of King Henry VII.

That the Court ought to have told the jury, that the grant of the advowson by King Edward IV. to Bishop Sherwood was not resumed, revoked, or avoided by the act of the 10th of King Henry VII., and that the grant, notwithstanding the said act, or any other act or matter, was and still is a good, valid, and subsisting grant.

That the Court ought not to have told the jury, that the grant to Bishop Sherwood became, and was, on the passing of the act of the 10th of Henry VII. resumed, revoked, avoided, and made of none effect.

That the Court should have told the jury, that if they believed that King Edward IV. was seised of the manor and advowson as of his private property, and, being so seised, had made the grant, that the same was not resumed, revoked, or avoided by the act of the 10th of Henry VII.

That the Court told the jury, there was no evidence that King Edward IV. was seised of the advowson as of his private estate.

That the Court refused to direct the jury, that

by the effect and operation of the fine levied by William, seventh Earl of Clanricarde and Helen his wife, to John Brown, Gerald Dillon, and Antony Mulledy, all the estate and interest of the said Earl William and his heirs, of and in the said advowson, was conveyed and passed away from the said Earl and his heirs; and that the said Earl, and his heirs, and the Plaintiff below, were estopped, barred, and concluded thereby from having, acquiring, claiming, or alleging any estate, term, interest, or possession, of or in said advowson.

That the Court told the jury, that the fine was not a bar to the Plaintiffs' right to recover on the issues.

And — That the Court refused to tell the jury, that the fine was sufficient evidence to show that the Plaintiff was not, and had not been, possessed of the said advowson, or any term therein.

The Defendant in error having filed a joinder to the errors so assigned, the case was argued on several days by counsel for both parties respectively, in the Court of Exchequer Chamber in Ireland, whereupon the judgment obtained by the Defendant in error, in the Court of Common Pleas, was affirmed.

From this judgment a writ of error was brought in parliament where the same errors were assigned.

For the Plaintiff in error, the *Attorney General* and *Sir William Follett*.*

The title of the Plaintiff in this case stands upon the allegation of one grant and one presentation and admission under it, supported by documents which have been improperly admitted in evidence: whereas, upon the face of this record, at least from the year 1626, this living has continually been filled by collations from the Bishop of Meath,

* In chief and in reply.

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and it is only in the year 1828, two centuries after the time when we can trace the rights of the Bishops of Meath, that it has been called in question. That appears on the face of these proceedings. If we could travel out of the record into matters which have since have been investigated, we could shew that they have collated long prior to that date.

It appears that in the year 1626, the very person upon whose presentation they count, namely, Donnellan, was collated by the Bishop of Meath. It appears that in 1642, William Bury, who they say was presented by a grant of the Earl of Clanricarde, was collated by the Bishop of Meath. It appears that in 1695, Anthony Dopping was collated by the Bishop of Meath. In 1741, Peter Warburton was presented, not by the Earl of Clanricarde, but by the King, in consequence of a vacancy created by that Anthony Dopping being made a bishop. In 1784, Henry Logan was collated by the Bishop of Meath, and he held it down to the year 1828, when the present possessor was collated by the Bishop of Meath. To get rid of the effects of these collations, it is suggested that it is the duty of a bishop to collate to the benefice in the event of a lapse; but how do they account for the Bishop of Meath collating in 1626, and continuing to do so without any opposition, the individuals so collated continuing to hold the living to their death, and upon their deaths the then bishop again collating to that living? the strongest proof of the continued exercise of the right.

Against such proof a verdict has been obtained by the admission of documents not duly authenticated and misdirection of the Court. Those docu-

ments were, in truth, the only material evidence in the cause, and having been erroneously submitted to the jury, it must be inferred that they produced the verdict; and, therefore, the question at issue ought to be sent to a new trial. What is that issue? The Plaintiff's present to the living under the title of the family of Clanricarde. They count upon the presentation of a person of the name of Donnellan in 1626. Since that year there has been no exercise of the right by the family. But independently of the unauthenticated documents, how do they make out their title? It is admitted that by grant of Edward IV. to the Bishop of Meath of the advowson it had been severed from the manor, and then became an advowson in gross. They produce a grant to John King by letters patent of King James I., bearing date at Dublin the 30th October in the first year of his reign. In this grant nothing is said about the advowson of this church. It is a grant of the manor of Rathweir, with all the rights and advowsons belonging or appertaining to the manor. King James I. does not profess to grant to John King the advowson to this church; he gives him the manor of Rathweir; and the only mode in which the Earl of Clanricarde can set up any title under this grant is by shewing that when King James executed the letters patent, this advowson was appendant to the manor of Rathweir, that is the first step in their title.

In the fourth year of the reign of King James I., a fine was levied by John King and Catherine his wife to Richard Burke, fourth Earl of Clanricarde, of the manor and lordship of Rathweir, with all advowsons, rectories, or rights of patronage, and other appurtenances to the said manor belonging,

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so that John King also passes only the manor with the advowsons belonging to it. Then a king's letter bearing date the 8th day of April, in the 6th year of King James I., directs the acceptance from Richard, fourth Earl of Clanricarde, of a surrender of all his manors, and temporal and spiritual possessions and hereditaments in Ireland, held by patent or other instruments; that a new grant of the same should be made by letters patent; and that a commission should issue under the great seal of Ireland to enquire as to the same: and by an inquisition taken at Athlone on the 4th of May, 1609, it is found that the then present earl of Clanricarde and his ancestors were lawfully seised in his demesne as of fee of the manor of Rathweir, with all appurtenances belonging to the same by purchase from John King, as appeared by deed of bargain and sale, dated 1st January, 1606, specifying among other things the said manor, and all advowsons of churches and vicarages in any manner belonging to the same; so that here again there is nothing said about the advowson of this church; no advowson is mentioned by name, but simply the manor with its appurtenances. Nor is this advowson mentioned expressly in any of the conveyances to the Clanricarde family. Such is the title under which they claim.

The question is, whether the advowson of the church of Killucan was at the time of the grant by King James, appended to the manor; of this there is no evidence, except in the two documents mentioned in the bill of exceptions. There is a deed dated in 1702, which recites that Richard, late Earl of Clanricarde, by indenture, dated 6th April, 1702, and made between the said Richard and John

Morgan the elder conveyed unto the said John Morgan, among others, the advowson or right of patronage of the rectory of Rathweir and Killucan. That is the only deed in which the advowson is mentioned by name, and it destroys their title.

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The first plea of the Bishop, after stating that he is seised of the advowson in gross, in right of the see, traverses the appendancy of the advowson to the manor of Rathweir, there is therefore a distinct issue raised on this fact. The next material plea is a denial that Richard the fourth Earl was seised of the manor with the advowson appendant; and there is a denial that Edward Donnellan was admitted and instituted on the presentation of Richard the fourth earl.

The Plaintiffs, to prove the facts, offer a deed which they state to have been found in Lowton House; that deed is not pretended to be an act of the fourth Earl of Clanricarde whose seisin is traversed, or any presentation of Edward Donnellan, whose alleged presentation is traversed. It has been contended that we have no right to offer in evidence a certain fine, because it was not properly admissible upon any of the issues raised. Now upon what issue is the deed of the fifth Earl of Clanricarde or the presentation of Barry, admissible evidence, unless it be upon the general one to prove the title of the Plaintiff? Is it because the fifth Earl of Clanricarde granted the next presentation to Donnellan, that therefore the fourth Earl of Clanricarde was seised of the advowson; or what proof does that afford that Edward Donnellan was presented by the fourth Earl of Clanricarde? It is admissible in evidence no doubt because it shews the title of

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the Clanricarde family, under which the Plaintiff counts: And therefore when you come to the general traverse, no doubt the deed of the fifth Earl of Clanricarde, or the presentation by the representative of Donnellan would be admissible in evidence, but it is no evidence under the special traverses. It is important for your lordships to bear in mind that the most material document of evidence for the Plaintiff is offered, not upon a distinct issue or traverse, but upon the general traverse upon which they say our fine is not admissible in evidence.


Supposing that the documents are receivable in evidence upon the pleadings as they stand, and that if properly authenticated they prove the title of the family of Clanricarde, the next question is whether they were properly authenticated. We contend, that according to the established rules of evidence, neither the deed nor the case ought to have been submitted to the jury at all. It has been superfluously contended that it is a rule of law, that a deed thirty years old does not require proof by an attesting witness, and that the courts discountenance the production of an attesting witness to prove the execution of such a deed. But this doctrine must be qualified by the question, does it come from the proper custody, which is the material point of the issue in this case, and it applies to both documents. As to the case, supposing it properly authenticated, there is another and distinct objection, the objection to receiving it in evidence, as being a statement made by a client for the opinion of his counsel.

With respect to the deed, the proof that it comes from the proper custody is upon the Plaintiff. In

the course of the discussion which has taken place, it has been assumed that these papers have been found in the custody of a descendant of the bishop of Meath. The evidence proves no such thing; Dopping says, "he is a descendant of Anthony Dopping, formerly Bishop of Meath, and that he has in his possession several papers." But where did he get those papers? he never had the custody of those papers. He must shew that he is that species of descendant who was likely to have the papers of the party, and that they were properly in his custody as the descendant of that person. But the mere fact that he was a descendant, if he had produced them from his own house, would not be sufficient to allow those paper to be received in evidence. This he does not shew, and therefore so far as regards authentication these papers might as well have been produced at the trial by a stranger. It appears that Sir William Betham went to Lowton House, "and that the Rev. Mr. Sirr was with him; that he found said parcels of papers in a room with other papers, and that he handed said parcel of papers, to the said Mr. Sirr on or about the 28th of October, 1828: that Lowton House belongs to or is inhabited by Mrs. Dopping, a middle aged lady." But whether she is connected with the family of the Bishop of Meath does not at all appear. Sir W. Betham says, "he put no mark on the papers, but that he took copies of them; that at the time of finding the papers he found several visitation books of the diocese of Meath, particularly one of the year 1616, by George, Bishop of Meath, and that there were in the same room other papers relating to the see of Meath, several of

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“ which were in the parcel which he brought
 “ away.” These other papers were not produced.

Suppose a witness to state that he found certain papers, produced with a book which he says was a visitation book of the diocese of Meath; and suppose upon enquiry it turned out that the book was a book belonging to the diocese of Ossory; does it not show the extreme danger of allowing a witness to state the contents of a written paper? If the document is to receive authentication upon the ground that it was found with the visitation book of the diocese of Meath, it was most important that the book should be produced to show that it was in fact the visitation book of the diocese of Meath. Are we to take the statement of Sir William Betham, the brother of the party in the cause, that this book belonged to the diocese of Meath, and that these papers were found in connection with it? Lowton House has no connection with the registry of the diocese; and, if these papers are to receive authentication merely from being found in company with the visitation book belonging to the diocese of Meath, that book ought to have been produced.

In the case of wills, if a witness goes to the proper custody for such wills, and says, “ I found this
 “ among the wills of a certain date,” you need not produce the other wills to prove that they bore that date. But if, as in this case, a witness goes to a house unconnected with the diocese, not proved to be connected with the Bishop or any of the parties, then if such paper is to receive its authentication by other papers that are found with it, those papers should be submitted to the court, that the court may see whether they answer the

description given by the witness ; otherwise a great doubt may arise, and the fact may be disputable. It is different where the paper is produced from a place where such documents are likely to be, or ought to be, as from among the title deeds of an estate, from the muniment room or office where they ought to be kept ; that is enough. So, if the witness in this case had been to the Bishop's registry, and produced the paper from the place where the visitation books or where the presentations are kept, that would be good evidence without producing those other documents. But where the whole effect of the document is to depend on the papers which are found with it, and they are found in a place where you would not expect to find any paper connected with the document, then, to authenticate the paper in question the others must be produced ; otherwise, you allow the witness to give parol evidence of the contents of papers, in order to make an ancient document evidence. This would be a most dangerous rule to lay down.

But if the finding of the document at Lowton House is material, should not Mrs. Dopping, who is the inhabitant, or somebody connected with that house, have been called as a witness to authenticate those papers ? Where were they when found ? Sir William Betham goes into this house, and finds them. But where ? not in a place of deposit. Apparently, for anything that appears in the evidence as stated, these were papers that might have been put on a table in that house for the express purpose of being found by Sir William Betham. Should we not have the evidence of some witness who knew the papers, and that they

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belonged to the Dopping family (of which we have no evidence). Anthony Dopping seems to have no knowledge of these facts. If those papers belonged to the Dopping family, ought not some person to have been produced, who could prove that they belonged to the family, that they were kept in that house, and that they were found by Sir William Betham in the usual place of deposit? It appears on the proceedings, that there are no papers in the registry of the diocese of Meath prior to 1717. It is suggested that the papers might have been in the custody of a bishop of Meath; that these papers were found among the papers which were kept and belonged to, and have descended from, a bishop of Meath prior to 1717; that these papers were in the company of papers belonging to a bishop of Meath prior to 1717; and that they were kept with other papers relating to the affairs of the diocese, and continued to be so kept down to the time when they were found. These are ingenious suggestions, but there is no evidence to support them.

There is something extremely suspicious about the production of this paper, not to take it on the naked question of admissibility of evidence. Why have they not called persons connected with this house, and these papers? Why have they left it to a relative of one of the parties, to go to that house and pack them up, and, instead of producing them himself, handing them to some other person to be produced, who states himself to be a descendant of the family? The document itself is not quite free from suspicion on the face of it. It is a cancelled deed, dated in 1637, and without a seal: then how is it connected with the Dopping family? It purports to be dated in 1637. But there is no evidence that any person of the name of Dopping

was Bishop of Meath in 1637. No person of that name became Bishop of Meath, until long after that date. How did this cancelled deed get into the possession of Bishop Dopping? It professes to be a deed granting the next presentation by the then Earl of Clanricarde to Dr. Edward Donellan. Where should that deed be? Not in the custody of any bishop. It has been suggested that the bishop might want the deed for his own protection. In what way? A stranger, if he made the presentation to the next turn, would be expected to produce to the bishop the authority under which he made it. But he would not leave it with the bishop. It would remain in the hands of the grantee. They say there was a *quare impedit*; but if so the bishop does not want the deed, for he has no interest whatever, but is bound to present the person who produces the deed. It is not to the bishop that you would look, but to the family of the grantee; that is the proper custody of the deed. If a search had been made among the papers of the family of the grantee, and the deed had not been found, but it was produced from a place of custody beyond all suspicion—for instance, the registry of the diocese—it might be said that, although the deed would most properly have been in the possession of the grantee, yet, inasmuch as the bishop must have acted on the deed, and it was found among the documents of the diocese, the court might properly under such circumstances admit the deed to be produced in evidence. But in this case there is no evidence that any bishop of Meath ever lived in Lowton House, or that it ever belonged to any bishop of that see. There is no evidence that any papers belonging to that see were ever kept there.

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The case on which the Plaintiff mainly relied, of *Bullen and Michel* *, differs from this in the facts. There it appeared, that the monastery on the dissolution had come into the King's hands, and he had granted it out again; and a great portion of the possessions of that abbey had been granted to a person under whom the Earl of Bath claimed; and the Earl had in his muniment room the title deeds relating to that property; and among other deeds was found a certain chartulary of the abbey; upon proof of these facts, it was held that the document came from the proper custody, for Lord Bath was possessed of the very land to which the document related, and it was kept among the title deeds of the property. But suppose there had only been evidence at the trial that somebody had gone into the house of Lord Bath, and carried away that chartulary without proof how it was kept, and without connecting Lord Bath with the monastery, the witness merely stating that he found it; or suppose another witness had been called to state that papers relating to the abbey were found in that house; would that have been sufficient evidence?

The case of *Bullen and Michel*, so far from being an authority for the Plaintiff, is an authority to shew the deficiency of his evidence. None of the facts proved in that case to shew that the document came from the proper custody are in proof here. If they existed they might have been proved, and the defect of proof raises a suspicion.

Again, *Randolph v. Gordon* † is an authority against the admission of this evidence. In that case, the Lord Chief Baron held that the book was

* 2 Price, 399.; 4 Dow, 298. † 5 Price, 312.

not admissible, and said, that though the Defendant was the grandson of the party who was the former rector, yet he might have got the book from somebody else, who handed it over for the purpose of having it produced. There was no proof that it had existed for any length of time among the documents of the family, and therefore it was not admissible. In that case, many of the entries purported to be made by the rector, the grandfather of the person from whose custody it came; but it was held that it was not sufficient without proving that it was found among the papers belonging to that rector. In this case, there is no proof that this deed was found among the papers belonging to Anthony Dopping, who was Bishop of Meath; nor is there any legitimate evidence that it was found among any papers relating to that see. The substance of the rule is, that the custody of the document should be connected with an interest in the estate. If this does not appear, directly or indirectly, it is not admissible in evidence. In *Potts v. Durant**, the proof was rejected, because the document came from the custody of a private person. So in *Michel v. Rabbets*†, where it came from the Bodleian Library. So in *Swinerton v. M. of Stafford*‡, where a grant was brought from among the Cottonian MSS. in the British Museum. In *Atkins v. Hutton*§ a terrier was rejected because it was not found in the registry of the bishop or the archdeacon of the diocese, but was brought from the charter chest of Trinity College, Cambridge. So in *Miller v. Foster*||, as to a terrier found in the registry of the Dean and Chapter of Litchfield. In

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* 4 Gwill. 1453.

† 3 Taun. 91.

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§ 2 Anstr. 386.

|| 2 Anstr. 416.

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*Randolph v. Gordon** the document was rejected, being produced by the grandson of the rector without shewing any connexion with the rectory. *Earl v. Lewis*† was a case where the papers were delivered by the son of a deceased rector, to the attorney of his successor in the living; they were identified by the attorney, and held admissible without producing the son, the connexion between the custody of the papers and the estate being established. So in *Bullen v. Michel*‡ the document was produced from the custody of the grantee of the crown.

The objection to the deed, as not being admissible from defect in the proof of custody, is applicable equally to the case. The deed is most material evidence supposing it were acted upon, but of this there is no evidence. So far as the evidence goes, it shews that the deed was not acted on, that no person under that deed presented any clerk at all, but that a clerk was collated by the Bishop of Meath, and apparently in his own right; for the entry is that he was collated in the ordinary form. But they seek to make out that the deed was acted upon by the production of this case, for without the case the deed is nugatory.

The case as offered in evidence purports to be a case for the opinion of counsel on the part of Anthony Dopping, Bishop of Meath; on whose behalf, on the 28th of February, 1695, it appears to have been stated, that in the year 1637, Ulick Earl of Clanricarde granted to Dr. Donnellan, incumbent of Rathweir, the next presentation of the living. If it contains such statement, it is at variance with the fact; for an ori-

* 5 Price, 312.

† 4 Esp. C. 1.

‡ 2 Price, 399.

ginal visitation book was produced of the diocese of Armagh, for the year 1664, from which there was read this entry:—" At a triennial visitation for " the diocese of Meath, &c., William Barry appeared and exhibited collation of the rectory and " vicarage of Killucan, alias Rathweir, granted by " Anthony Bishop of Meath, dated the 13th of " January, 1642." According to the evidence of this visitation book, there could not be any presentation under this deed. The fact therefore according to the evidence is contrary to the statement, supposing the case to state it.

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But how is this case evidence against the present Bishop of Meath, the Defendant in this cause? There is no proof that this case was drawn by Anthony Dopping, Bishop of Meath. It is not his hand-writing. It does not come from any place of deposit of his papers. It is not authenticated as a statement made by him, or in his behalf; but it is a case, found in the same way as the deed in Lowton House, with which it is not shewn that the Bishop ever had connection. They say, with respect to the deed, that the witness having stated that it was found among other papers relating to the diocese of Meath, that evidence might in some degree authenticate the deed; but how does it authenticate the case? This is a case said to be sent at the instance of some particular bishop. It is not shewn that he had any connection with the place where it was found; there was no person inhabiting that house, proved to be a relation or connection of his; there was no proof that the paper was signed by him, or that any paper belonging to him, or over which he had any control, or that he was ever in that house. According to the bill of

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exceptions it does not appear that the case was laid before counsel.

The argument for the Plaintiff refers to a class of cases of which *Higham v. Ridgway** furnishes a clue to the others, as to entries made against a man's own interest. If a party make an entry charging himself, that entry after his death is evidence in an action between third parties. To say that it is evidence against a party when it is made against his own interest, having no interest to mis-state or misrepresent, is stating the proposition too broadly.

The Courts have narrowed the rule, considered as settled in the case of *Higham v. Ridgway*. In *Chambers v. Bernasconi*† a document of this sort was tendered in evidence. It became important to ascertain the date of the arrest of a bankrupt, and the bankruptcy. The sheriff's officer who arrested him died; they offered in evidence a return made by that officer to the office of the sheriff of Middlesex, stating the arrest; the officer stated the arrest to have taken place at a house in the parish of St. Marylebone, on a certain day. And it appeared, according to the course of the practice of the sheriff's office, that the sheriff's officer is bound to make a return to that office of the time and place of every arrest he makes; that document so signed renders the officer liable to his principal, the sheriff. It was contended on behalf of Chambers in that action, that this entry of the return made by the sheriff's officer fell within the ordinary rules; that it was made by a person who clearly had no interest to misrepresent the place or the time; that, on the contrary, it was made by a person who, to a certain extent, was rendering himself liable, for he was re-

* 10 East, 109.

† 1 Cro. & Jer. 451.


turning to his principal the fact and place of the arrest, and if any escape had taken place after that return he would have been liable to that principal. Lord Lyndhurst, before whom the case was tried, received that evidence. Upon a motion for a new trial, the Court of Exchequer decided that Lord Lyndhurst was wrong, and that that document was no evidence of the place of the arrest. Mr. Baron Bayley stated, that the cases had gone far enough, that this was not one that fell within the ordinary rule of a party charging himself, and it was not receivable in evidence. The case went again to trial; the same document was tendered to Lord Lyndhurst, who, on the authority of the Court of Exchequer, rejected it; and a bill of exceptions was then tendered. It was argued in the Exchequer Chamber, and they confirmed the decision of the Court of Exchequer, that the document was not receivable in evidence.

The proposition as laid down for the Plaintiff is too broad. It is not every entry, or every statement made by a person, even against his interest, or having no interest to misrepresent, that is receivable. To bring it within the authority of the cases, it must be an entry made by a party charging himself; an entry so made as to render him liable to some duty, or some action. If this document be receivable in evidence at all, it must be upon the ground, that it is a statement made by the Bishop of Meath against the interests of that see, and that, if so, it is receivable in evidence against his successors. That must have been the ground on which the Court in Ireland received it, and not on the general ground of its being a statement made against the interest of the party. If it is proved that during

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the time when a certain person was Bishop of Meath he made a declaration, touching that diocese, against his interest, that might be receivable in evidence against his successors. But it must be shewn that it was made in his corporate capacity. A letter found in a corporation chest containing a statement by a person who, at the time, was not a burgess, was held inadmissible to affect the corporation. *Rex v. Gwyn*.*

The case of *Maddison v. Nuttall*†, to which reference has been made, proceeded on that ground. It was a case tried before the Lord Chief Justice of the Common Pleas on the western circuit. The question turned on the admissibility of a document purporting to be a terrier. The terrier was not found in the proper place of custody, but in the hands of a land-owner in the parish; and therefore certainly it was not in proper custody. But it was not tendered in evidence as a document authenticated by coming from a certain place of custody. Proof was given to authenticate the document *aliunde*. They called witnesses to prove, by comparing the signature and the writing in that terrier with documents admitted to be in the hand-writing of the rector of the parish at that time, that this terrier was in the same hand-writing. On the face of that terrier there was a modus in the parish, covering the tithe of hay, and the question was whether that document was receivable in evidence against the successors. The Lord Chief Justice held that it was, not on the ground that it came from the proper place of custody, but as a statement made by the rector in a matter connected with the rectory against his interest at the

* *Strange*, 401.† 6 *Bing*. 226.

time when he made it, and that the succeeding rector was bound by the statement; besides which, it may be considered as a question of reputation, whereas here is a question of particular facts. The Plaintiff refers to that case to shew that the statement or declaration made by the Bishop of Meath against his interest, or the interest of his diocese, ought to be received in evidence against his successors. If they had proved that Anthony Bishop of Meath had written or authorised that statement, *Maddison v. Nuttall* would apply, but in the absence of that proof it is inapplicable. They might have proved that it was in the hand-writing of the Bishop, but they did not. They might have proved that the writing, in some way or other, was a statement authorised by the Bishop of Meath at that time, but there is no such evidence. There is no evidence that he wrote, that he authorised, or that he ever saw the case.

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A statement *purporting* to be the statement of the rector is not evidence; it must be proved to be a statement of the rector. In this case they say that the document, although not proved to be in the hand-writing of the Bishop of Meath, is authenticated because it came from Lowton House. But the objections to the evidence apply to this case in the same manner as to the deed.'

There is another objection to the case very important, not only as regards this point, but the general policy of the law. In *Bolton v. The Corporation of Liverpool*,* the Vice-Chancellor directed that corporation to produce to the Plaintiff, who filed a bill of discovery, a case prepared on behalf of the corporation to be submitted to counsel;

* 3 Sim. 467, and on App. 1 M. & K. 88.

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and on appeal to the Lord Chancellor, the decision was, to a certain extent, confirmed; but with observations which authorise a statement that his lordship did not approve of the principle involved in that decision. Confidential communications from a client to his counsel or attorney are not receivable in evidence on settled principles.* It is not the privilege of the legal adviser; it is the privilege of the client; and is founded on this reason, that it is right as a general rule, and for the general safety and convenience of the subjects of this country, that they should be allowed freely and unreservedly to communicate any difficulties respecting themselves and their estates, to their legal adviser. It is more conducive to the public benefit to establish that as a general rule, than it is to compel or admit a breach of confidence by receiving, in such a case, a statement of a party against his own interest. An admission made by a party generally is receivable in evidence; it is strong evidence against the person making it: that is the general rule. But there is also another rule arising out of the principle, which prevents a court of justice, not only from compelling, but in an ordinary case from allowing, any disclosure of a professional communication to be made. If you consult an attorney verbally, he is not at liberty to disclose the statement you make; and for this reason, that if he might do so, if that statement made to him in his office, privately and confidentially, were given in evidence, it might have the effect of preventing all consultations with a legal adviser. If you state facts in a case for the

* In the suit pending *Preston v. Carr*, 1 Y. & J. 175. See *Greenough v. Gaskell*, 1 M. & K. 98.

opinion of counsel, he would not be allowed to produce or give evidence of it. If you write a case to an attorney, the attorney not only cannot produce it, but he would not be allowed to refer to it. Would it be receivable in evidence, if some other person had got that case so laid before a counsel or attorney? If an attorney were to hand that case over to another person fraudulently, or if that other person had procured the case from the office of the attorney, and produced it in Court, a judge would not allow it to be read. Is it not quite as much a violation of principle and of policy to receive it through another medium as to receive it directly from the counsel or the attorney? If this were allowed, then an attorney to whom a confidential letter had been written might, in any case, collusively put that letter on a table, and allow some colleague to take it away, and produce it in evidence. That cannot be the doctrine of law, because it involves an absurdity; because it is allowing parties to do indirectly that which, for the purposes of general policy, is not allowed to be done directly.

In *Bolton v. The Corporation of Liverpool*, the Vice Chancellor directed the production of the cases. If those cases are produced, with a statement by the parties in whose possession they are, the cases alone could not be read in evidence at the trial, and if they were read they could not bind the parties by the statement in the case. Lord Brougham, in giving judgment in the appeal in *Bolton v. The Corporation of Liverpool*, says*, "It seems plain that the course of justice must stop if such a right exists. No man will dare

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to consult a professional adviser with a view to his defence, or to the enforcement of his rights. The very case which he lays before his counsel to advise upon the evidence, may, and often does, contain the whole of his evidence; and may be, and frequently is, the brief with which that or some other counsel conducts his cause. The principle contended for, that inspection of cases, though not of opinions, may always be obtained as of right, would produce this effect, and neither more nor less, that a party would go into Court to try the cause; and there would be the original of his brief in his own counsel's bag, and a copy of it in the bag of his adversary's counsel. Nay, as often as a party found himself unprepared, or suspected that something new had come to his adversary's knowledge, he might (at least if he were Plaintiff) postpone the trial, and obtain a discovery of those new circumstances, which, in all likelihood, had been laid before counsel for advice. If it be said that this Court compels the disclosure of whatever a party has at any time said respecting his case; nay, even wrings his conscience to disclose his belief; the answer is, that admissions not made, or thoughts not communicated, to professional advisers are not essential to the security of men's rights in Courts of Justice. Proceedings for this purpose can be conducted in full perfection without the party informing any one of his case, except his legal advisers. But without such communication, no person can safely come into a Court, either to obtain redress, or to defend himself."

Lord Brougham. — That is not in any action, but in the very suit in which the discovery is prayed.


For the Plaintiff in error.

It makes no difference whether it be with relation to that particular action or any other ; for it depends entirely on the principle or reason of the rule, which is, to allow a person freely and unreservedly to communicate with his professional adviser. It applies equally to all persons in all actions. A doctrine was once laid down by Lord Tenterden, that the question of privileged communications only referred to a case where an action was about to be brought, and a communication was made in reference to that action. That *dictum* of Lord Tenterden's has been overruled.

Lord Brougham.—That doctrine was considered in *Greenough v. Gaskell*. I pronounced judgment, after much deliberation and consulting with Lord Lyndhurst, and several of the judges. In that case Lord Tenterden's law was considered.

I ought to mention that, with respect to the case of *Bolton v. The Corporation of Liverpool*, both I and Lord Lyndhurst, (probably because we had come from the other side of Westminster Hall,) had so great a dislike of acting on the inveterate and not now to be changed practice in courts of equity, that we did all we could to limit that principle and introduce the exception which the case of *Hughes and Biddulph* and others have now introduced ; we acted with the concurrence of other judges in the Court of Chancery. But, we would fain have carried it a step further, according with your argument, for we felt the principle, but we were met by *Radcliffe v. Fursman*, decided in the House of Lords, and decided on great deliberation : that case gives the law, which we could not alter. The case is not

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accurately reported, but the law of that case is not to compel the party to produce the case with his answer to explain it, but to allow the case to be received in evidence without any explanation.

For the Plaintiff in error.


As to that doctrine of Lord Tenterden's, he so decided at *Nisi Prius*: if he had investigated the matter, he would have seen that the principle applied to other cases, as well as to actions pending. What is its meaning? if it is not established in consequence of the general principle or policy of the law, why should it exist at all? if it be allowed in the case of an action, should it not be allowed in the case of a party consulting an attorney as to the title of his estate? and ought not his communication with his attorney to be free and unreserved, and privileged in that case? If that were not so, instead of acquiring safety by consulting an attorney or counsel as to the title of an estate, that very consultation might lead to the destruction of your property. Well known cases have occurred of a party laying his title before an attorney; and in consequence of disclosure of facts by the attorney contrary to his duty, a ruinous litigation ensued. Such was the case of Lord Clinton; and if courts of justice were to allow cases laid before attorney or counsel to be given in evidence without explanation or qualification, they would destroy the principle on which the rule itself is founded.

In *Bolton v. The Corporation of Liverpool*, the judgment on appeal, so far as regarded the cases, rested on the ground that they related to the action then before the Court. But it appears that the observations of the Lord Chancellor apply equally

to all communications of that sort : he says, " It seems plain that the course of justice must stop ; " if such a right exists, no man will dare to consult " a professional adviser, with a view to his defence " or the enforcement of his rights ; without such " communication, no person can safely come into " court either to obtain redress, or to defend " himself." This principle would equally apply whether the case was laid before counsel, respecting a particular action then in dispute, or a general case in reference to some other action, or still further, to a case laid before counsel where no action was pending or contemplated ; but a mere statement to get the advice of counsel, on some supposed defect in the title of the party consulting him. Is it not then within the principle stated by the Lord Chancellor applicable to consultations on the title of an estate ? is it not essential to the security of men's rights that they should have the power to obtain advice freely, fully, and unreservedly ? Yet if you allow this case to be received, supposing it were authenticated, what is it ? It is a statement of a Bishop of Meath on some supposed defect of title respecting the advowson, and asking of a professional man advice on the question, how he is to act respecting that advowson. And will your Lordships allow that which he lays before his professional adviser in the full confidence that no possible use can be made of it, to be received as evidence, and as the only evidence on which the parties profess to dispute his successor's right to present to that advowson ? If this can be recognized as law, the party is without defence ; and on this statement alone so made (supposing it was made) by a bishop to his professional adviser, freely, fully,

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and unreservedly, as he thought he might safely do under the protection of the law, he, or his successor, is to be deprived of his property.

In the case on appeal of the Corporation of Liverpool, the Lord Chancellor goes on to say, " Yet violent as such compulsory disclosure may be deemed, and wholly inconsistent with the possibility of safely transacting judicial affairs, if the authorities are in its favour, we must submit. *Radcliffe v. Fursman* is the case commonly relied on in these questions. It is a decision of Lord King's, affirmed in the House of Lords. If it had decided the point in question, there would have been no alternative but submission. The report in Brown's Parliamentary Cases is imperfect, and in one respect not correct; for it conveys an inaccurate notion of the nature of the demurrer. But even by the report, and certainly by the printed cases which I have examined, together with my noble and learned predecessor, it appears plain that the record did not shew any suit to have been instituted, or even threatened, at the time when the case was stated for the opinion of counsel: and the decision being upon the demurrer, the Court had no right to know anything which the record did not disclose. All the Court knew was, that a case had been laid before counsel at some time, in order to satisfy the party consulting whether his rights had been affected by a certain lapse of time. And the ground on which the production was resisted, appears to have been the mischief of disclosing statements, confidentially made for the private ease and satisfaction of parties." The rest of the judgment of the Lord Chancellor proceeds on that distinction, and he overrules so much of

the Vice-Chancellor's decision as related to the case, which was the subject matter of the suit. But in this cause it is not a question, whether or not appeals in the House of Lords, or suits in the Court of Chancery, have been rightly decided. It may be that a court of equity might direct the production of this case ; but it is a very different thing, whether a court of common law would receive it in evidence upon the mere production of the case, without any explanation whatever. I can find no precedent which has gone to that extent. Among all the authorities to which the Court refers, and upon which comments are made in the judgment in the appeal case of the Corporation of Liverpool, I can find none in which a court of common law has allowed the case to be so received in evidence.

If, then, there be this mischief in the rule, if the Lord Chancellor and his noble and learned predecessor were so anxious to destroy that practice in a court of equity, but found themselves bound down by authority, sitting in appeal from a court of equity, your Lordships sitting as a court of common law at least will not allow that doctrine to be introduced into the courts of common law, where it has never existed. The question here is, whether you will allow this case, supposing it to come from among the documents of the Bishop of Meath, to be received in evidence, though it is stated in the bill of exceptions, that it purported to be confidential and submitted by the Bishop of Meath to his counsel to advise him on his right and title respecting the advowson now in dispute. On this ground also this case is not receivable in evidence. To allow its reception would be a most mischievous doctrine, and effect an extension of a rule already

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considered contrary to policy and principle, further than the decided cases warrant.

In the case of *Greenough and Gaskell* *, according to the marginal abstract, “upon a bill which sought to charge the solicitor with a fraud practised on the Plaintiffs in the course of proceedings on his client’s behalf, the Court refused to order the production of entries and memorandums contained in the Defendant’s books, or of written communications made or received by him relating to those proceedings, and admitted by the answer to be in the Defendant’s custody.” (Communications, written or verbal, the Court refused to permit him to disclose.) “And generally it seems that a solicitor cannot be compelled, at the instance of a third party, to disclose matters which have come to his knowledge in the conduct of professional business for a client, even though such business had no reference to legal proceedings, either existing or in contemplation.”

Lord Brougham. This ought not to have been in the *semble* ; it goes a great deal further than the principle, and destroys the distinction which Bolton and the Liverpool Company imposes. In the Court of Chancery the client has protection as against the confidential communication to his solicitor ; but you may wring his conscience so as to know his innermost thoughts. You may ask what his opinion is ; what are his expectations ; or, perhaps, what are his wishes. There is scarcely a question which you may not ask him ; such is the doctrine of *Radcliffe v. Fursman* as regards the bill of discovery, but I agree that your distinction is very material ; it does not follow because I

* 1 Mylne & Keen, 98.

have a right in equity to discover for my party, and even for the purpose of a suit at law to discover from my adversary, all his most inward thoughts, that I have a right to have out of his attorney's mouth, or to take out of his own repositories and give in evidence by itself a paper explained by the rest of his answer.

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For the Plaintiff in error.

On these grounds we submit that this document on which the verdict must have turned is inadmissible ; it is not receivable on general principles. It is a statement made (according to the bill of exceptions) by a party to his counsel, concerning his right or title to this very advowson. As such it is a confidential communication, made to obtain advice, and that is the main ground of objection; there is another which applies equally to the deed, namely, that there is no authentication.

Now as to the other part of the case. The defence is not only a denial of the title of the Plaintiff, but an assertion of the title of bishop. It is not disputed that the bishops of Meath were formerly owners of this advowson under a grant from Edward IV.; and the question is, whether that advowson so vested has by any act been taken away.

It appears according to the evidence, that the bishops of Meath have been in the habit of collating to this living; we have, therefore, the grant of the king, and acts of ownership on the part of the bishops.

It may be argued that, notwithstanding these collations, long since the statute of 10 Henry VII. that act has had the effect of destroying the right under the grant, and of reappending the advowson

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to the manor; but that statute did neither the one nor the other.

The object of the act is stated to be that the king intended to have a general resumption of his whole revenues. But this is a question not touching the royal property of the King of England, but a question touching the private property of King Edward IV. It is not property that ever belonged to the Crown of England; it belonged to Edward IV. under a distinct title, and would have gone to his heirs, and not necessarily with the crown. The object of the statute was to take back into the king's hands such of the property of the King of England which he had in Ireland *jure coronæ* as would afford revenues to the Crown. It is one of the grounds of objection that the judges told the jury, when they expounded to them the statute of 10 Henry VII., that there was no evidence whatever that the manor or the advowson of the parish church of Rathweir ever had belonged to the Earl of March in right of that earldom. This can only be accounted for by supposing that the judges did not refer to the evidence given on both sides; for it is necessary to go from one part of the evidence to the other, to shew that this title is traced down to the Earls of March; but the fact is clearly made out by the following documents, in the reign of King Edward III., reciting the desire of the king to ascertain the real value of the manor of Rathweir, &c., which were of Roger de Mortimer, late Earl of March, and which were then in the hands of the Crown as escheats by forfeiture, &c.

1. A king's letter or mandate in the 28th year of the reign of King Edward III., directed to the

barons of the Exchequer, reciting that the judgment by which Roger de Mortimer, late Earl of March, was adjudged in parliament an enemy, and his heirs disinherited, was, on account of divers errors found on the record and process of judgment, annulled, and his lands, &c. restored; and the king thereby commanded that all charters, &c. be delivered over to Roger de Mortuo Mari, now Earl of March, cousin and heir of the late earl.

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2. An Inquisition taken before the barons of the Exchequer of Ireland in Dublin in the 23d year of the reign of King Henry VIII., whereby it was found that King Edward IV. was seised in his demesne as of fee, the day on which he died, of the manor of Rathweir; and had issue Elizabeth, Anna, Cecilia, and Bridget, his four daughters; and that being so seised, he died on the 9th of April, in the 23rd year of his reign; and that after his death, the said manor, with all its appurtenances, descended to his said daughters in right of heirship, and, that afterwards King Henry VII., in the 1st year of his reign, took to wife Elizabeth, one of the said daughters, by virtue of which King Henry VII., and Elizabeth the queen, his wife, as in right and title of the same queen, entered into the same manor, &c.

It appears, therefore, that the manor of Rathweir had not been held by Edward IV. in right of his crown; for if so, the eldest daughter alone would have inherited the manor. An observation has been made that the sons of Edward IV. are not here mentioned; it is a curious fact that in a statute of Queen Elizabeth, tracing the property of the queen to lands in Ireland, the sons of Edward IV. are also omitted.

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Lord Brougham. — It appeared in a late argument before the Privy Council on the subject of coronations, that a notion had prevailed, which was then not quite exploded, although it never was founded on any judicial authority, that a coronation was necessary not to substantiate the title, but to make conclusive evidence of the fact of the devolution of the Crown. It was not supposed to be a proof of title, but a sort of evidence of possession. Neither of the young princes were crowned, but Richard III. most decidedly was crowned, and he is omitted also in the pedigree set forth in this inquisition.


For the Plaintiff in error.

He would have had no claim, in his natural capacity, to the land, as representing Edward IV. who was Earl of March, and the property by this inquisition is traced from the natural person of Edward IV. to his daughter's heiresses in a private capacity. The reason why the two sons are omitted is difficult to account for ; it might be that the order of descent could not be traced, as it was unknown which of the princes died first. Henry VII. never admitted that he held the crown in any right derived from his wife, but always repudiated that title in the acts of parliament passed in his reign.

Upon this proof could it have been just to tell the jury that there was no evidence that the property belonged to the earldom of March? On that point it is conclusive, yet the judges in express terms directed the jury that there was no evidence of it whatever. On that ground, alone, independently of other objections, the Defendants are entitled to a new trial. If it was an important fact

that the advowson was not the property of the King Henry VII., in right of his crown or as King of England; but that he held it in right of his wife alone, as surviving co-heiress of Edward IV., the jury were misdirected on that point. As to the mode in which that property ought to have been granted—under what seal that grant was made does not appear, and is not material; but it is important to see under what seal King Edward IV. granted away any part of the possessions of the earldom of March. It appears by the case in Plowden, that the kings of England were in the habit of granting sometimes under the great seal of England (which they had full power to do) land held in their private right, but they were also in the habit of granting such lands under different and distinct seals. If this advowson was granted as part of the possessions, and under the seal, of the earldom of March, the statute of 10 Henry VII. does not apply to it either in word or in spirit.

In an English act of parliament, 4 Henry VII., cap. 14, entitled, "Sealing of "writings touching the earldom of March," there is a recital that every grant made by King Edward IV., of any part of the possessions of the earldom of March, was made under the special seal of that earldom. If so, the advowson in question was granted under the seal of March, and not under the great seal of England. Edward IV. being king might have passed the advowson either by letters patent sealed with the great seal of England, or with the private seal of the king, and no livery of seisin was necessary. But it appears by the recital of this act of parliament that every grant

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which Edward IV. made of the property of the earldom of March, was sealed with the seal of that earldom, and it is thereby enacted, that "all feoffments, gifts, grants, &c., where sealing is requisite to be made of any parcel of the said earldom, be had, done, and made by the king, our said sovereign lord, under the broad seal of his Chancery, as it is used in all other things concerning the Crown by the course of the common law and by none other seal." This is a prospective act of parliament, and recites the fact that Edward IV. made his grants of the property of the earldom of March, under the seal belonging to that earldom.

At the date of the grants in question, the kings of England had not assumed the title of kings of Ireland, they were then named lords of Ireland. The Irish statute of 33 Henry VIII., cap. 1, confers the title on the kings of England from that time; reciting that they had borne the title of lords of Ireland before. It was supposed that the Irish did not pay the obedience to the king which they ought, on the assumption that he was not king of Ireland. The statute declares that the kings of England shall be kings of Ireland, and shall have all the same rights and privileges they had in England. As lord of Ireland he had the same powers though under a different name.

The object of the act 10 Henry VII. was to take back into the king's hands certain property of the Crown, from which formerly were derived certain revenues in Ireland. This act of parliament can apply only to such parts of the Crown lands, as yielded a revenue to the Crown; it cannot apply to the grant of an advowson in gross which was not the subject of profit, the king could derive no profit

from resuming it, he had no right to receive any money payment, or derive any income or benefit whatever from such property. Even supposing that the advowson yielded a profit, the act of parliament on the face of it, does not purport to take back any property granted by the Earl of March.

The act of parliament using the words "noble progenitors, the kings of England and Ireland," could not include King Edward IV. We do not rely on the literal meaning of the word "progenitors" as excluding Edward IV.; but on this ground, that Henry VII. never, in any act of parliament or any document to which he gave his assent, acknowledged that any princes of the house of York were his progenitors. He did not acknowledge the title of the princes of the house of York. In the acts of parliament passed in his reign relating to the property of the Crown, he draws the distinction between King Richard III. and Edward IV. and the princes of the house of Lancaster, using the word progenitors as applicable to the latter, and distinguishing the other persons as not falling within that designation. The observation made upon this argument from the bench in the Court below was, "You say that Henry VII. meant to resume into his hands all the grants made by the princes of his own family, but did not mean to resume into his hands the grants made by the enemies of his house." But probably the princes of the house of York, made no grants of the lands of the Crown in Ireland; and if they did make grants of part of the private possessions of the house of York, it was not intended by Henry VII. to resume them. It is unimportant what the object of the king was; because you find upon

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the face of this act that it does not apply to grants made by Edward IV. of part of the possessions of the house of York, and if you collect that not only from the object of the act, but from the words used in it, you cannot take from persons a right to this property which they have held for centuries, unless you bring them within the clear meaning and object and letter of the act.

Henry VII. had married a daughter of King Edward IV., and in the public acts which were passed in that reign, King Edward IV. is not called a usurper, he is called King of England; but he is not called a progenitor or prince belonging to the house of King Henry VII.; a distinction is made between him and King Richard III., who is described as a person who held the crown by wrong. But the princes of the house of Lancaster are described as the progenitors of this king. That is a distinction made in all the acts which passed in the reign of Henry VII.

In the act of parliament referred to, and set forth in *Plowden* *, entitled "A repeal of a feoffment made by King Edward IV. of certain lands and tenements of the Duchy of Lancaster, by authority of Parliament, for the performance of his last will, in the twelfth year of his reign," the distinction is manifest which is made between the princes of his own house and the House of York: every thing proceeded upon the repudiation of the title of the House of York, and in the documents and the statutes of that reign there is no acknowledgment of the House of York, either as the kings of England or as the progenitors of Henry VII.; on the contrary, the persons

* Case of the Duchy of Lancaster, Vol. I. fo. 220.

he described as progenitors were those who descended from the House of Lancaster, and not those who descended from the House of York. That, of itself, would be a reason for not applying this act of parliament to a grant made by Edward IV. of possessions of the House of York. The earldom of March was part of the possessions of the House of York, it was no part of the possessions of the House of Lancaster, it was no part of the possessions of the Crown of England, and Henry VII. might do what, in those days, might be considered an act of justice, in resuming into his own hands property that was held by his own family, as kings of England, which he might have scrupled to do, had any part of it been the private property of the House of York. On this act of parliament there is nothing to lead to the inference that it was so intended.

It has been contended, that all property which vested in a king of England would immediately become part of the possessions of, and would merge in, the Crown, no matter how they were derived. We deny that proposition: the power and the privileges of the king would attach to those lands just in the same way as they attached to lands held *jure coronæ*, with respect to the mode of conveying them, and as to all rights and powers which the king might exercise over lands held *jure coronæ*. But this does not apply to the course of descent; such lands do not merge and go to the kings of England, but to the heirs of the natural body of the king. As to lands which the king takes by purchase after he is king, the proposition is not denied; but as to lands which come to him by descent, or by some other title, they are not

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affected by the prerogative except in so far as it is applied to them. The lands which Edward IV. held in right of the duchy of York, or the earldom of March, on his accession to the Crown, he would have a right to dispose of in such manner as he could dispose of the lands of the Crown; but the lands of the duchy of York, or the earldom of March, which descended to him before he became king, would not be affected as to the line of descent, but would go to the heir of Edward IV. of his natural body, and not to the king of England; and therefore the possessions of the house of York, or earldom of March, instead of going to Richard III. would go to the daughters of Edward IV. That it is so in point of law was the understanding at least, and the feeling of that day; for the inquisition says that it was property which belonged to Edward IV., and did not go to Henry VII., or Richard III., as king, but descended to the daughters of Edward IV.

The case in *Plowden* is considered an authority. The act of parliament procured by Henry IV. to separate the possessions of the duchy of Lancaster from the possessions of the Crown, raised an assumption that, if it were not for that act, those possessions would have merged in the Crown. That is an unfounded notion; for the descent of lands of the duchy of Lancaster is regulated, not by that one but by several acts of parliament, and, among others, by the act which passed in the reign of Henry VII. after the battle of Bosworth. The law respecting those lands is laid down in *Plowden**, not as the Plaintiffs contend the law to be, as I read the case, but directly the other way. The Lord

* In *Wyllion v. Barkley*, fo. 250.

Chief Justice, in his judgment *, says, "As to the matter in law I am of the same opinion," &c. And then he says, "Such heirs must come from the natural body, for the body politic cannot beget issues." There may be a grant to the king and the heirs of his body, but how would that go? it would not merge in the Crown but go to the heirs of the body of the king. Then he says "So that the limitation of the inheritance here to the heirs male of his body distinguishes the body in which the donor had a mind the king should take it." Suppose the grant had been made to Edward IV. and the heirs of his body, would it have gone to Richard III.? Would it have gone to Henry VII.? Certainly not; it could only have gone to the heirs of the body of the king,—to the daughters and their heirs. The judgment goes on to say "For if King Henry VII., after the remainder limited to him, had been removed from the royal state and another had been made king, neither the succeeding king, nor his heirs, should have had the land, because the donor limited it to Henry VII., and to the heirs male of his body; and if the heirs of the other body should inherit it, it would be contrary to the limitation and will of the donor, for there is not any such inheritance limited by the gift; wherefore the limitation here has respect to the natural body of King Henry VII. and to the heirs male which his natural body shall beget, and so the capacity and body in which he shall take it is distinguished and limited in the gift."

Lord Brougham.—There was a remarkable instance of a bargain made between Henry VII. and

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the Earl of Berkeley, touching the castle and barony of Berkeley Castle. Upon a question which arose in this House on the claim to a barony*, a territorial barony, it appeared, by the evidence produced, that there was a grant, by means of which the rank of marquis was conferred on a certain series of heirs, and on the tenant of the fee simple of Berkeley Castle. Henry VII., a very avaricious prince, as Lord Bacon says he was generally supposed to be, obtained, as a consideration for giving this title, a grant in tail male, of Berkeley Castle, failing the issue male of the body of the grantor. He had heirs male of his body, Henry VIII. (of pious memory). Henry VIII. had heirs, Edward VI.; and the estate coming to Edward VI., who died without issue male of his body, Elizabeth and Mary being the only heirs of the body of Henry VIII., and there being no heirs male of Henry VII., the estate tail, limited by the grant, was exhausted and expired in the person of Edward VI., and then the estates came back under the reversion in fee simple to the heir at law of the grantor. That is a case which aids your argument, — if they were Crown lands they ought to have gone to the queens, Mary and Elizabeth. Lord Hale differs from some other lawyers on that question.

For the Plaintiff in error.

The judgment goes on thus: — “ So if a man
 “ gives land to a bishop, and to his heirs thereby,
 “ he distinguishes in what capacity he has a mind
 “ to place the inheritance and in what capacity the
 “ bishop shall take it; and as the donor pleases to
 “ limit it, so it shall enure: for if he had given the
 “ land here to King Henry VII. and to the heirs
 “ of his body, and the body of Elizabeth, his wife,

* Berkeley Peerage Case.

“ begotten, such heirs, and none other, shall take
 “ it. And land may be entailed to the king as
 “ well as to another, for King Henry IV. entailed
 “ the duchy to him and to the heirs of his body
 “ begotten, and the Crown was entailed to Henry
 “ VIII. and the heirs of his body; so that the
 “ king may make an entail as well as another,
 “ and the remainder here vested in the body na-
 “ tural of King Henry VII. So that if he had
 “ resigned the Crown to King Henry VIII., yet
 “ he should have held the land to him, and to the
 “ heirs of his body, as land distinct from and no
 “ part of the Crown.”

Now, it is impossible that language can be stronger against the proposition for which the Plaintiff contends, that all land belonging to the king, no matter how it came to him, from the moment he acquires the Crown becomes merged in his political character of king, and must go to the kings of England, as all other parts of the land which are held *jure coronæ*.

Lord Brougham. — Lord Holt * says that all lands and tenements of the king belong to him *jure coronæ*; for a purchase to him, and his heirs, shall vest in his political capacity, and the king can have nothing in his private capacity unless in right of his duchy or an estate tail.

For the Plaintiff in error.

The authority of *Plowden* † proves this, that the lands belonging to the Earldom of March are no part of the lands of the king held *jure coronæ*, in the ordinary sense of the word. We do not contend that he might not have applied the prerogative to them; but he did not hold them as part of

* *The Queen v. Smith*, 7 Mod. 78. † See *Plowden*, 234.

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the possessions of the Crown which were to go with the Crown at all times. The object of this act of parliament is, to take back the revenues of the kings of England and Ireland, which were not part of the possessions of the House of York. The very object shewn in the act negatives the fact of their applying to these possessions.

As to the authority in *Coke on Littleton**, it is confined to lands held *jure coronæ*. He says, "And you shall understand that, concerning descents, there is a law, parcel of the laws of England, called *jus coronæ*, and differeth in many things from the general law concerning the subject." Then he gives various examples: "The king, in any suit for any thing that pertains to the Crown, shall not shew in certain his co-sinage as a subject shall do, or as he himself shall do for things touching his duchy." (He makes a distinction in the very passage.) "And in the case of the king, if he hath issue a son and a daughter by one venter, and a son by another venter, and purchaseth lands and dieth, and the eldest son enter and dieth without issue, the daughter shall not inherit these lands nor any other fee simple lands of the Crown, but the younger brother shall have them." (That is, so as to fee simple land which belongs to the Crown, or which the king purchases.) "Wherein note, that neither *possessio fratris* doth hold of lands of the possessions of the Crown, nor half-blood is no impediment to the descent of the lands of the Crown, as it fell out in experience after the decease of King Edward VI. to Queen Mary, and from Queen Mary to Queen Elizabeth;

“ both which were of the half-blood, and yet inher-
 “ ited not only the lands which King Edward or
 “ Queen Mary purchased, but the ancient lands
 “ parcel of the Crown also. A man that is king,
 “ by descent of the part of his mother, purchases
 “ lands to him and his heirs, and dies without issue :
 “ this land shall descend to the heir of the part of
 “ the mother ; but in the case of a subject, the heir
 “ of the part of the father shall have them. So
 “ King Henry VIII. purchased lands to him and
 “ his heirs, and died, having issue two daughters,
 “ the Lady Mary and the Lady Elizabeth : after
 “ the decease of King Edward, the eldest daughter
 “ Queen Mary did inherit only all his lands in fee
 “ simple. For the eldest daughter or sister of a
 “ king shall inherit all his fee simple lands. So it
 “ is if the king purchaseth lands of the custom of
 “ gavelkind, and die, having issue divers sons ; the
 “ eldest son shall only inherit these lands. And
 “ the reason of all these cases is, for that the qua-
 “ lity of the person doth in these, and many other
 “ like cases, alter the descent, so as all the lands
 “ and possessions whereof the king is seised in
 “ *jure coronæ*, shall, *secundum jus coronæ*, attend
 “ upon and follow the Crown ; and, therefore, to
 “ whomsoever the Crown descends those lands and
 “ possessions descend also ; for the Crown, and
 “ the land whereof the king is seised in *jure co-*
 “ *ronæ*, are *concomitantia*. If the right heir of the
 “ Crown be attainted of treason, yet shall the
 “ Crown descend to him, and *eo instante* (without
 “ any other reversal) the attainder is utterly
 “ avoided, as it fell out in the case of Henry VII.
 “ And if the king purchase lands to him and his
 “ heirs, he is seised thereof in *jure coronæ*, *d for.*

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“ *tiori*, when he purchases lands to him, his heirs,
 “ and successors.”

No doubt the king holding lands in *jure coronæ*, they would be attached to the Crown and go with it; therefore if the king resigned the Crown the next day after the purchase, they would go to the succeeding king. But there is a note to the passage, in *Coke on Littleton* * which is taken from Lord Hale’s manuscript. That note explains the decision and the distinction.

“ *Nota*, by the common law the king is a
 “ corporation, and purchases made by him
 “ after assumption of the Crown vest in a politic
 “ capacity : hence if an usurper purchases lands,
 “ and the right heir resumes the Crown, he shall
 “ have the purchases ; *et e converso*, an usurper
 “ shall have the purchases made by a rightful
 “ king, so long as he has the Crown. So it happens
 “ in the cases of Henry IV., Henry V., Henry VI.,
 “ Edward IV., Richard III., Henry VII. But
 “ *nota*, purchases made before accession of the
 “ Crown or descents from collateral ancestors after
 “ accession of the Crown, vest in a natural
 “ capacity ; and therefore in the re-ademption of
 “ the Crown by Edward IV. there was a special act
 “ to give to the king all the possessions of Henry
 “ VI. But such lands are qualified and affected
 “ differently from those of other persons. They will
 “ pass by letters patent only, and without livery ;
 “ and the grants of them shall not be avoided by
 “ nonage *et similiter*. As to acquisitions by conquest
 “ by the King of England, they are annexed to his
 “ Crown, as his purchases are ; as Ireland, Man,
 “ Berwick, Calais, and the New Plantations,
 “ the ancient territories of Normandy, Aquitaine,

“ Anjou, and also many other lands which descended in England from collateral ancestors, though in their original vested in a natural capacity, yet partly by attainder, partly by long continuance united to the Crown, partly by occupation, were in some manner annexed to the Crown, and will go with it.”

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This note points out the distinction, for it says where the king purchases after he becomes king, or they are annexed to the Crown, they are taken by him in his political capacity; and wherever the Crown of England goes, these lands will go with it, even to a usurper. But those lands which the king purchased before his accession to the Crown, or which came to him by collateral descent, not from the kings of England, remain in him in his other character. These lands are subject to all the same powers as regards the king, as the land held in *jure coronæ*, but not subject to the same descent: they will descend to the heirs of the parties from whom they came: to the heirs of the body of the king, if the king hold them in tail: they will go to the heirs general of the king, if he hold them to him and his heirs, but not to the Crown. The authorities are clear on that point. Whether the lands of the manor of Rathweir were held by the Earl of March in fee simple or in fee tail does not appear, and it is immaterial for this purpose; because in either case Henry VII. could have had no title. The king, as such, could have had no right to them, having married one of the four daughters who was entitled in coparcenary to the possessions of that earldom, Henry VII. had in him a title in that right.

The act of parliament which directs the resumption into the king's hands of the grants of the

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kings of England to increase their revenues, could not apply to property so held by Henry VII., with three other persons, in right of his wife, and which, according to the finding of the inquisition, descended on the heir of Elizabeth as the heir of the Earl of March, and not on Henry VIII., as king of England; and according to that finding, if the other sisters had not died without issue, three fourths of those lands would not have descended to king Henry VIII., but would have gone to the heirs of the other coparceners. This act of parliament cannot be taken to apply to land which was the private property of Edward IV. The application for the enactment comes from the commons of Ireland: it was not likely that they could have had any interest in the king's getting this property away from the grantee of Edward IV. under the seal of the Earldom of March.

The form of the grant of the advowson by the letters patent does not affect the question. For if the king granted part of the Earldom of March, the advowson of this living to the Bishop of Meath, he might grant it in much the same form as he granted the lands held *jure coronæ* under letters patent in his name of King. If they were lands in Ireland, he would follow the form of the king's grant, which is the same in substance and form, with the sanction and under the authority of the Lord Lieutenant of that part of the king's dominions, as if the lands were held *jure coronæ*. And the grantee of them would preserve as evidence that copy of the letters patent, which would be enrolled and form the evidence of the title of the grantee. Lord Hale says*, "So that he cannot do it without doing it as king; and it

* P. 213.

“ would be inconvenient and beneath the dignity
 “ royal, for the law to make the king give livery
 “ in proper person to a subject. And besides,
 “ livery of seisin is matter of fact, which the
 “ king cannot do, for his acts ought to pass by
 “ matter of record which is suitable to his Majesty;
 “ and therefore the land shall pass by the king’s
 “ letters patent only by the course of the common
 “ law. And so it has been the practice with regard
 “ to the lands which descended to the king from
 “ the Duke of York, the Earl of March, and others
 “ of the king’s ancestors who never were kings.”

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There is another argument to be raised on the construction of this act of parliament, that it clearly applies only to lands granted under the great seal of England and Ireland. These words might have been introduced into the act for the express purpose of excluding the grants made by Edward IV. of the Earldom of March. We have a right to assume, after the recital in the English act of Henry VII., that there is no grant of the possessions of the Earldom of March, made by Edward IV. under the great seal of England or Ireland; for that act of parliament shows that all such grants were made under the seal of the Earl of March. The words would not apply to a grant so made. It appears moreover that in certain cases the statute in question had not been acted on. In the 25th Henry VIII. chap. 2. of the Irish statutes, there is a recital that advowsons, grants, &c. by Edward IV. shall not be affected by the title of Henry VII., for what reason or under what circumstances does not appear, nor is it necessary to ascertain; but it furnishes explanatory reasons why the act in question should be allowed

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to remain on the parliament roll, unheard of until this action, just as much as if the act of parliament had fallen into desuetude. (*Lord Brougham* here intimated that the counsel for the Defendant in error would be allowed to rejoin to this part of the reply, as being new matter.) It is sufficient to state, that the act is not applicable to this particular property. And that would account for the fact of the Bishop of Meath having, notwithstanding this act of parliament, been in undisturbed possession of this property for so many centuries.

They can make nothing of their case, unless it be found on one of these issues that the advowson was appendant to the manor of Rathweir: that is not a mere technical objection, but one that goes to the very root of their title; for the patent of James I. does not profess to grant the advowson of this church, nor does the conveyance of the king to the Earl of Clanricarde. It conveys only the manor; and unless this advowson is appendant to the manor, the Plaintiff has no right to present. But what is the meaning of the act of parliament? unless the effect of it is to make null and void *ab initio* the grant of Edward IV., and of all the kings from Edward III. down to the time of passing the statute in question, this advowson cannot be appendant to the manor. It is conceded that the grant of King Edward IV. disappended the advowson from the manor. It is not disputed that the effect of the grant of King Edward IV. was to convert what had been an advowson appendant to the manor, into an advowson in gross, in the hands of the Bishop of Meath and his successors. The question is whether the act of parliament can re-annex it and make it append again?

The law on that point is this: — If an advowson appendant to a manor become dis-annexed and severed from that manor, and be afterwards regranted or surrendered back to the owner of the manor, it does not become appendant again. It does not lose its character of an advowson in gross, but will be held by the lord of the manor in gross, distinct and separate from the manor itself. The argument is, that the advowson was re-appended; that if the grant which severed the advowson from the manor be put an end to, if it be rendered null and void altogether, then the advowson will become appendant to the manor again. Taking therefore these to be the two propositions of law, the point to be determined is, whether this act of parliament rendered the grant of Edward IV., the grants by Edward II. and all his successors down to the time of Henry VII., void from the time of the original grant, or whether it only annulled them from the time of the passing of the act. Surely but one construction can be put on the act of parliament, viz. that from the time of the passing of the act, the grants that had been made by preceding kings of England became annulled, and that the king then took back, or resumed the possessions of the Crown which had been separated from it.

We are hardly to suppose that in any times of our history, an act of parliament could have been passed to declare void those grants from the beginning, seeing the injustice which must have ensued. Every act which had taken place under the grants would have been an act of wrong, and actions might have been brought. The very fact of the apparent owners being in possession of the land would be a trespass; no act done on the land thus granted

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could have been justified, but the parties would have been wrong-doers, though they held under a grant from the Crown. The object of the act is not to give to the king any by-gone right, previous to the passing of the act, but to resume into the king's hands from that time the revenues of the Crown, and to render them applicable to the uses of the Crown. It was not necessary to do more than annul the grants from the time of the passing of the act; and therefore unless the words of the act of parliament are explicit to annul them from the time of the grant, the construction of all Courts would be to hold them annulled only from the time of the passing of the act. The language of the act shews that there was no intention to declare that these grants were void from their very inception. Having recited that the revenues had been diminished, it "ordains and establishes that there be resumed and taken into the king's hands all manors, &c. whereof any of the kings of England were seised from the last day of Edward II. to the passing of the act," (that has no by-gone application, that is prospective). Then come the words on which they rely; "and all grants, &c. from the said day to be resumed," &c. They read "from the said day" to apply to the words, "resumed," &c.: that is not the meaning of the passage: it is, "all manors, &c. &c. granted from the said day." It applies to the grants of manors, and feoffments made by the authority of parliament, from that day, namely, the last day of Edward II. What then? That they be resumed: What is the meaning of that? The resumption cannot be applied to the time of Edward II.: it must apply to the time of the passing of the act, and

that from that time they shall be declared void and of none effect. These are all prospective enactments, that all grants from that day be resumed, and they are declared void, and of none effect. The effect of this act of parliament can only be to take back into the king's hands, from the time of the passing of the act, the possessions which had been granted by the preceding kings, and to declare and make void from that time all grants of the king's predecessors.

The whole of the law as to the appendancy of advowsons is laid down in Comyn's Digest, title Advowson B: it is laid down thus—“An advowson may be appendant to a manor, or in gross. “Appendant to a manor is, when it has always “passed by a grant of the manor *cum pertinentiis*.” Then he puts various examples of appendant and in gross. He proceeds thus—“If an advowson be “in gross, it cannot afterwards by any act be appendant, except where the act which made it in “gross be totally avoided, as a recovery after an “usurpation. As where the reversioner of a manor “to which an advowson is appendant usurps, then “the particular estate determines, and the advowson “is become appendant again. An advowson is appendant to the demesnes, not to the rent;” and for that doctrine he quotes 1st Leonard. But there is another case, the first case in 2nd Modern Reports*: the law is there distinctly laid down, that if the advowson be once severed from the manor, the resumption of that, or the surrendering it back into the hands of the Crown or the owner of the manor, does not re-append it; but it must be some act which makes the grant itself void from the beginning, which will alone re-append it to the manor.

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In the case of *Reynoldson v. Blake and The Bishop of London* *, the question arose on a *quare impedit*; and the declaration stated, "that it was a grant by deed of the rectory to which the vicarage of Saint Anne's, Blackfriars, appertained by Sir George Gouge." The judge said, "he would consider what would destroy an appendancy. If an advowson by act of the party be once severed from the manor, to which it is appendant, though but for an instant, it becomes in gross, and the appendancy is destroyed forever. And therefore the difference is, if a man seised of a manor to which an advowson is appendant, accepts a fine of the advowson and grant, and renders every second turn, by the alternate turn the appendancy continues. But if he levies a fine of the advowson, and accepts a grant and renders, the appendancy is totally destroyed, because there was an instantaneous severance. So if there be two co-parceners of a manor to which an advowson is appendant, and they make partition of the manor without taking notice of the advowson, the advowson at each turn continues appendant; but if they make express exception of the advowson upon the partition, it becomes in gross. If they make partition of the manor, and the rents are allotted to the one, and the services to the other, the manor is destroyed and the advowson becomes in gross. But if the one dies without issue, so that the demesnes descend to her who has the services, or *vice versâ*, the manor is revived and the advowson becomes appendant again because it was by act in law. So that the diversity is where the severance is by act of law, and where by the

* Lord Raymond, p. 192.

“ act of the party, by 17 Edward III. ch. 38,
 “ and the 12 Henry VII. ch. 5. The question
 “ then will be if the union be an act in law,
 “ and he was of opinion that it was; because
 “ it was made by the spiritual judge, who is the
 “ chief actor in it. And though the advowson be
 “ destroyed by the severance, yet when it is severed
 “ in turns, each turn becomes appendant still,
 “ because it is done by act in law, which does not
 “ alter the nature of the thing. And that union
 “ does not destroy the appendancy, he cited Dier,
 “ 259 B. as an express authority; and Windsor’s
 “ case is an authority in point; for that was a
 “ *quare impedit*, for a Church united as appendant,
 “ as appears by Croke Elizabeth, page 688. If then
 “ at Common Law union would not destroy the
 “ appendancy, much less will an Act of Par-
 “ liament do it, which is an act of the highest
 “ law, which designs to do no wrong to any, but
 “ only to take away the incumbency, and give to
 “ each a second turn instead of it, and in the same
 “ plight as he had the advowson before.”

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It is argued that this was a resumption into the
 king’s hands of an advowson granted by Edward IV.
 and, being by Act of Parliament, it became append-
 ant again. This case is no authority for that pro-
 position. The case is, that he formed a union
 between the two parishes, and he directed that each
 should present in turn: that act of parliament
 which so united the two parishes, and directed the
 parties to present, did not operate to dis sever the
 advowson at all: it was not the question but it did
 not operate to dis sever it from the manor to which it
 originally belonged. But the statute of 10 Henry VII.
 is not to be considered as an act of parliament to

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that extent: it is an act done by the legislature and we must admit by consent of the House of Commons of Ireland; and even if the king is to take back into his hands what had been granted, it would have no other effect than if it had been surrendered into the king's hands: he would then not take it and hold it again as appendant to the manor; all that is said is, the king resuming it, the grant shall be void from that time. The effect of that act of parliament is nothing more than to give back to the king that advowson which he had given to the Bishop of Meath: it would not be appendant again, but be holden separately and in gross. That point therefore of the issues is sufficient to prevent the operation of this act of parliament, for the act it is under which they claim: they claim it as being appendant to the manor; and unless it be appendant, they have no title.

We rely mainly on this position, that the statute of King Henry VII. applies to no grant whatever, made by King Edward IV. of possessions of the Earldom of March; that it is not within the spirit, scope, object, or letter of the act; that this is not a possession of the Crown; and that the act of parliament does not in any way apply to it; that it is a different sort of property; and therefore the act does not apply to it. The advowson did not here become appendant to the manor or pass under that deed of King James I. to John King under which the Earls of Clanricarde pretend to found their title. It does not confer the title on that house but the advowson is either in the Crown, if that act of parliament had any application at all, or if not in the crown, it remains in the Bishop of Meath under the grant of Edward IV. who claimed the right to it.

There is one other point, on the effect of the fine. This is not an objection going so strictly to what may be called the merits of the case. It is used by the Defendants, not for the purpose of shewing a title in themselves but for the purpose of protecting their possession by shewing that it is not in the Plaintiff. The fine will not affect any title whatever in the Bishop of Meath, but only have the effect of excluding the present claimants.

The first question is, whether or not that fine be admissible in evidence? Now one of the pleas of the bishop by way of inducement is, "That the said Plaintiff ought not to have, or maintain his action thereof aforesaid against him, because he saith that his predecessors (Bishops of Meath) were, and he the said bishop was, and is seised in the manner in the said first plea to the said 5th count mentioned of the advowson of the said church in the said 5th count mentioned: and being so seised, collated the same, being vacant, to the said reverend James Alexander, his clerk in the manner and at the time in the said first plea to the said 5th count mentioned, as he might lawfully do without this, that the said Plaintiff is possessed of the said advowson of the said church of Kil-lucan, otherwise Rathweir, in manner and form as the said Plaintiff hath in the said 5th count of the said declaration alleged, and this he is ready to verify." It becomes unnecessary on that plea of the bishop to enter at all into the argument, that the clerk could not plead any plea which would let in this fine against the Earl of Clanricarde. The bishop at all events may so plead. But supposing the objection good, this is not the stage of proceedings in which notice could be taken of the objection, or

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an opinion formed upon it: you are now sitting to try whether or not certain evidence is receivable, but not on the effect of that evidence at the trial. It is said the plea is bad. Then they ought to have demurred to it. We by no means concede that it is bad; but if it be so, it would be bad only on special demurrer, not in any way that would allow the Plaintiff to take advantage of, or objection to, that plea in this course of proceeding nor can the House take notice of it: it is not in the bill of exceptions, nor is it noticed in the errors assigned on the record. No error is assigned respecting the form of those pleas. As a Court of Error your Lordships' attention is not called to the forms of the pleas at all. We affirm that the pleas are good; and if the question had been raised, some authority must have been shewn to induce you to decide that they are bad. That it is a correct mode of pleading could be shewn if the point were in dispute. As far as regards the plea of the bishop, what does it amount to? The traverse and the issue taken on that traverse is, that the Plaintiffs were not possessed of the advowson, and the right to present in the manner and form they have alleged. It being argued that this fine would shew the title to this advowson out of the Plaintiff, they contended that the fine was not admissible in evidence on that issue. The court below held it was admissible in evidence.

It has been suggested that it was not receivable in evidence unless specially pleaded; and that observation certainly is entitled to great consideration. But we contend that it is not necessary to plead it, and moreover it could not be pleaded. If a fine or any other thing is relied on as an estoppel between the parties, it must be pleaded.

An estoppel will only operate if pleaded. And if we have recourse to this fine to shew that the Earls of Clanricarde (who were parties or consorsors of the fine) are estopped by it, in the literal meaning of the word, it ought to have been pleaded. But the question is whether we have a right to use it as evidence to shew that the Earl of Clanricarde parted with this advowson, if he had it, for the words of this fine include the advowson, and therefore this fine, if it belonged to the Earl of Clanricarde, would pass the manor and the advowson appendant to it out of the house of Clanricarde. In that sense this could not have been pleaded. It is an elementary rule of pleading that you cannot plead specially any matter without confessing and avoiding the statement of the opposite party. You may confess and avoid the title which is set out in the record, by some other matter; but unless you do so, you can only traverse. They say that this advowson was in several Earls of Clanricarde, whose descent is set out on the record, and the title is traced down to the present Plaintiff. Any special replication, any allegation of a new matter in pleading, must have admitted the fact stated in the declaration. We could not have alleged any new matter merely consistent with the fact stated in the declaration, but it would have been necessary to confess the declaration before we could have pleaded any special matter. The pleading therefore of the fine would have been bad pleading, it would have been alleging a matter inconsistent with the title of the Plaintiff; but not the confession and avoidance of that title, nor would it have been a traverse.

The proper course of pleading in such a case is

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to deny the title of the Plaintiff, and then any act or matter which shews that the Plaintiff had not a title is properly receivable in evidence, under the traverse of that title.

The authorities on this point are all collected in the argument of counsel, in the case of *Arlett v. Ellis*.^{*} In a case like the present, if you intend to rely on the evidence of any matter which shews that the Plaintiff has no title to present, the proper form of pleading is to traverse the right to present; to plead a fine, or any other matter specially, would be bad pleading. *Arlett v. Ellis* was the case of an action of trespass brought by certain persons for breaking and entering a close: the plea was that this place was parcel of a certain manor, and that the copyhold tenement there in question was within the manor, and that the Defendant had a right of common over it. The Defendant then justified under a lease of that copyhold tenement, for breaking and entering, and prostrating the fences as under a right of common. The issue was on the mere right of common. The replication took issue on the custom, that is to say, stated that there was no such custom in the manor for the owner and occupier of that messuage to have any right of common over the *locus in quo*. The question at the trial was whether there was in fact any custom within the manor for the lord of the manor to inclose parcels of waste against the commoners; and whether the lord, in accordance with that custom, had inclosed the *locus in quo* previous to the trespass complained of. It was objected that that was not admissible in evidence on a mere traverse on a right of common, and that a person under whom the Plaintiffs claimed ought to have specially

^{*} 7 Barnewall & Cresswell, 346.

pleaded the custom to inclose within the manor, and that the land in question had been enclosed. It was argued on the part of the Plaintiff, who claimed the right for the lord to inclose, that not only that special replication was not necessary, but that it would have been bad pleading, and the Court acquiesced, and on this simple ground, that the right was set up as a customary right of common as a freehold tenement at the time of trespass committed, and that you cannot reply specially any fact inconsistent with it; you must confess and avoid, or deny it. If you make a special replication you must confess the fact. If you mean to say the right of common did not exist at the time of the trespass, you must deny the right stated, and then you will be at liberty to give in evidence the custom to enclose under it. The Court were of that opinion; they adopted that proposition of law on the authority of several cases. In the case of *Margatroid v. Law* *, the Defendant pleaded in bar that he was seized in fee of his close, and that all those whose estate he had therein, had been accustomed to take the water for the convenient watering of their cattle in the close. Upon general demurrer, the plea was adjudged ill, because the Defendant had neither confessed and avoided, nor traversed the matter alleged in the declaration; but it was said if he had pleaded the general issue, the facts stated in the special plea would have been a good answer to the action. So the parties here having traversed the right of the Plaintiffs to this advowson, and to present; anything shewing that the Plaintiffs had not a right to present, was admissible under that issue. So in a case of a

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* Carthew, 116.

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party who justified under a right of common, the issue being taken on that, the defence was that the right of common had been released before action brought. Under what replication should that release have been given in evidence? Under the replication denying the right of common; for otherwise you plead badly by not confessing and avoiding the statement of the opposite party. The inducement to this traverse cannot be traversed: it is wholly immaterial; the only effect and object in having it on the record is, that if there is any question or matter of law, the opinion of the Court may be taken at once on the law, stated in the inducement; but the fact submitted to the jury is on the traverse; the Court look to that, and both parties must be governed by it. The traverse is that the Plaintiffs had no right to this advowson; and if anything be shewn proving that the Plaintiffs had no right to this advowson, it is properly receivable in evidence.

Suppose an action on a deed, and instead of pleading *non est factum*, I plead *nil debet*, which is a bad plea on special demurrer? If they join issue, the Plaintiff may prove the whole allegation in the declaration; it puts in issue the whole. Though the Plaintiff need not have joined issue upon it, being a bad plea; yet if he joins issue, he is bound to prove the whole allegation; and under that plea of *nil debet*, the Defendant would give in evidence any thing shewing that the Plaintiff had no right of action against him.

Now, on this plea of the bishop, and the pleas of the clerk, which deny the fact of possession, and the right of the parties, the fine was properly receivable in evidence. By those pleas traverse is

taken on the ownership of this advowson, and the right to present. What is the effect of the fine? It is not for a nominal consideration, but for a large sum of money to pass this estate into the hands of other parties. It was contended that the conusor of the fine, the then Earl of Clanricarde, had done nothing afterwards in it; and that, as they shewed, the Earls of Clanricarde were treated as owners of the advowson afterwards, it might be presumed that the conusee of the fine became a trustee for that family. The facts stated on the fine lead to the opposite inference. It is for a large money consideration. But assuming it to be open for them to argue the point, is it not a question for the jury; and should it not have been left to them, whether the conusor was trustee for the Earl of Clanricarde,—whether they would presume a conveyance from the trustee of that to which the fine professed to relate? It was said by the judge below, that the fine had no reference to those proceedings; he told them that the fine was no bar to the Plaintiff's right to recover on the issues, but he should not have received the fine in evidence when tendered by the Defendant's counsel, and objected to on behalf of the Plaintiff: he erred in telling the jury that it had no weight in the case. Whether the fine had any or no weight, whether it might be supposed that the conusees were trustees for the Earl of Clanricarde, were questions for the jury. They ought to have had the fine submitted to them for consideration whether it had such effect; but no such question was submitted to them. The judge took away the fine entirely from the consideration of the jury. That is one of the points on which we except to his direction. The judge

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ought to have submitted to the jury the question whether or not the fine destroyed the Plaintiff's right to present, for the Plaintiff has no right to bring this action against the Bishop of Meath, unless he is owner of the advowson. He has no right to put himself in the position of the Crown if the advowson vested in the Crown; and it appears on the evidence that the manor so granted, afterwards escheated and became vested in the Crown. On that ground also, we are entitled to your Lordships' judgment on the bill of exceptions. The fine is material evidence to shew at least that the Plaintiff had no right to present to this living. If he treated it as a living or advowson appendant to that manor, and that had been taken from the Earl of Clanricarde and forfeited to the Crown, the Plaintiff who claims under the Earl of Clanricarde, could have no right to present to it.

We submit on all the points taken before the Court below on the bill of exceptions, that the Plaintiffs in error are entitled to your Lordships' judgment, and the cause ought to be sent to be tried by another jury, where the evidence may be properly sifted; where that which is not evidence shall not be presented to the jury, and that which is legitimate evidence may be presented to them with all its proper weight and authority.

For the Defendant in error, Sir *F. Pollock* and Mr. *Miller*.

In this case the principal question arises upon the evidence. It is alleged that the grant of the next avoidance which was executed by Ulick, the fifth Earl of Clanricarde, and the case prepared on behalf of Bishop Dopping, were not admissible. The result of the evidence relating to the circumstances under which those documents were


obtained is, that no diocesan records of the see of Meath, are to be found in the registry of the diocese of Meath, antecedent to the year 1717; that necessarily therefore any such as do exist at all, must be sought for and found in some other place; that certain of those records and documents of the see, anterior to that period, were found in a place called Lowton House, which house is designated as the family mansion and the residence of the Dopping family; the family of a former Bishop of Meath; that some at least of those documents ought to have been deposited in the public registry of the diocese, and that *quoad* those documents Lowton House, the place in which they were so discovered, must under the circumstances be regarded as the diocesan registry.

It appears, that the documents applicable to the present case were found among other coeval records of the see of Meath; and if so, the grant of the next avoidance was found with, and among the accompanying documents in the society of which it ought to have been found. That grant was originally given to the grantee named in it, for the express purpose of its being delivered to the bishop of the diocese when the occasion for using it should arise. But it is said, that it at all events amounted to nothing further than a claim of right, not followed by enjoyment or possession, at least that there is no evidence of the claim having been admitted or recognized. But if the other document similarly circumstanced and found at the same place, and at the same time, shall appear to have been legitimately admissible in evidence as against the present Plaintiff in error, then there is the fullest and the most complete admission and

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recognition of the right under which the present Defendant in error claims: furthermore there is the admission that on the presentation and under the authority of that grant, the nominee of the grantee was admitted instituted and inducted into the benefice.


But, is there no intrinsic evidence of the grant having been so acted upon? Why is the document found among the records of the see of Meath? Because it was necessarily produced and delivered to the bishop of that diocese, to shew and explain to him how a stranger to the patronage called upon him to institute his presentee, and because the bishop retained it as his warranty for instituting the nominee of a stranger into the benefice. If he had rejected the presentee, he should have returned the deed of gift. To have repudiated its authority, and to have retained the documents would have been a species of fraud: it would have been disabling the presentee from ascertaining the right he derived under that document, and by it; but the natural and more reasonable inference is, that the Bishop of Meath of that day did comply with the requisition of the patron of the benefice, and having done so he retained and deposited amongst the archives of the see the instrument which had authorized him so to act. It was an act of prudence to himself, and of justice to the patron; it demonstrated the authority on which the bishop acted, and it was fair to the patron in recording the exercise of his right, or as it is technically called his seisin of the advowson. The fact of the exercise of such right, with all its accompanying value, will be fully established by the other document similarly circumstanced and

similarly obtained, if it be ruled that the latter document was properly received in evidence. In support of the propriety of its admission and reception there are many decided authorities. In the case of *Doe v. Robson* * Lord Ellenborough stated, that the ground on which the evidence in that case (which was an entry in a deceased attorney's costs' book to shew the true time of executing a lease) had been received was this, that there is a total absence of interest in the persons making the entries to pervert the fact, and at the same time a competency in them to know it. In the case before your Lordships, there was a competency in the person stating the facts to have known them accurately, and it was contrary to his interest to state them in the manner that he has done.

In the case of *Higham v. Ridgway*† it is stated, that the like evidence has been admitted in other cases where the Court were satisfied, that the person whose written entry was offered in evidence, had no interest in falsifying the fact, but on the contrary had an interest against his declaration or written entry. That is the opinion of Mr. Justice Le Blanc in that case, and that is the precise case here.

Lord Ellenborough's principle, namely, the absence of any interested motive to misrepresent, and a competency to know the fact, is fully recognized by the barons of the Exchequer in the case of *Bullen v. Michel*‡; and Mr. Baron Graham (adverting to the case of the Chartulary of the Abbey of Glastonbury, which was found in Lord Bath's

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* 15 East, 34.

† 10 East, 120.

‡ 2 Price, 440.

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possession, who was owner of some of the possessions of the Abbey by grant from the Crown, although not of the parish in which the controversy in the case about moduses arose) says, "I also ground my opinion, that the document was properly admitted in evidence upon this simple rule, that an instrument of this sort, coming from a custody, which gives it authenticity as a genuine document, and relating to the subject of inquiry or point in issue, must be read to the jury, as bearing upon the question in issue. That judgment was affirmed in this house. In the case of *Short v. Lee* *, the Master of the Rolls decided, that where an inquiry is carried back to a remote period, the dearth of evidence naturally leads the Court from its desire of ascertaining the truth, rather to let in, than exclude what is offered, taking care always not to exceed the bounds of legal rules. He said, "these documents (old Proctors' accounts) possess those qualifications which always make the declarations of deceased persons evidence; namely, that they were persons having a competent knowledge, or whose duty it was to know, having no motive to make a false representation; and their written declarations being directly at variance with their interest, such declarations are universally evidence." In the case of *Fenwick v. Reid* †, it was held that a letter appearing on the face of it to be written by the Defendant's ancestor upon the subject of the suit, and coming out of the custody of the representative of the Defendant's attorney, was admissible without proof of the hand-writing, and that such a letter being found amongst the papers of the

* 2 Jacob & Walker, 488.

† 6 Mad. 1.

attorney was *prima facie* evidence, that it was written to the attorney, there being no address to it and the envelope being lost. Surely, that is carrying the principle much further than we have attempted to do in the present case.

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In *Maddison v. Nuttall*, the documents purporting to form a modus were found in the possession of a land owner of the parish, whose rights upon such a question were adverse to the other party, and whose claim would be sustained by proof of the modus: how much stronger would the case have been, if the documents had been found among the papers of the rector? In the case of *Isham v. Wallis**, the copy of a faculty, granted in 1613, was admitted in evidence in a tithe suit, it being produced from the custody of a person whose rights were abridged by it, and there being evidence that the original could not be found in the proper depository which was destroyed in the great fire of London. In that case a copy was admitted in evidence. In this case we produce the original document.

Much indulgence is due in respect to matters of evidence recorded in these Ecclesiastical depositories in Ireland: they have been subject to much spoliation; indeed, there is not perhaps an instance of a perfect registry in that part of the kingdom. The various commotions that have from time to time afflicted the country have led to the removal, suppression, or destruction of documents which it would have been much for the interest of the public to have preserved; but, owing to that circumstance, there is a great difficulty in producing on any necessary occasion, documentary evidence of any remote date.

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As to Bishop Dopping's knowledge of the facts, he undertook to state them, and he may have had personal knowledge of these facts; there may not be evidence (though the fact is stated) of the date of his birth; but, at all events, he possessed all necessary means for acquiring information on the subject, or he could have procured it; he had access to the Ecclesiastical Records then in existence, but which are not now to be discovered; and he was in possession of the grant of the next avoidance: he probably knew this Mr. Barry whose institution he states; or there might have been contemporaneous circumstances, from which every thing could have been learnt by him: and it is to be presumed, that he left no legitimate means untried, to acquire for himself the most accurate as well as the most authentic information on the subject, when the avowed object of his inquiry was as to the practicability of conferring such important and valuable benefits on a member of his own family; for in that case, as in the present, the collatee of the Bishop was his son.

An inconsistency is sought to be made out as to the institution of Doctor Donellan, he having been entered on the visitation books as a collatee. That is probably the clumsy substitution which so often occurs in those Ecclesiastical Records of one technical phrase for another. The term collation is not, in much better-considered works, confined to the strict sense. In a case * that is reported in 1 Merivale 490., the word "collate" is not used in the limited sense to which it is endeavoured here to restrict it. Sir Simon Degge says, "A donative" is a spiritual preferment in the church, which is

* *Mutter v. Charwell.*

“ in the free gift or *collation* of the patron, without making any presentation to the Bishop,” manifestly referring to a lay impropriation and using the word *collation* nevertheless. There is a further reference in the note to Degge’s Parson’s Counsellor, part 1. ch. 13. p. 204. Be that as it may, Bishop Dopping adopted the state of facts on which we rely, and which are before your lordships ; and as he possessed the means of knowing accurately how the matter stood, and as he had a direct interest in not representing the facts as they appear stated in the case, the evidence comes precisely within the principle laid down by Lord Ellenborough, and on which the most eminent judges in questions of this nature have uniformly hitherto acted.

With respect to the power of one party to compel another to produce a case stated for the opinion of counsel, the authorities upon it, are conclusive. *Ratcliffe v. Fursman**, *Stanhope v. Roberts*†, *Richards v. Jackson*‡, *Garland v. Scott*§, and *Newton v. Beresford*||, where it was recently decided by Lord Lyndhurst, that cases in the possession of a rector, which he or his predecessors had stated for the opinion of counsel, should be produced in a cause instituted by parishioners against their rector. In *Browne v. Rawlings*¶, a letter received from a confidential agent in 1728, containing a minute account of the tenants and rents of the estate received by a tenant for life, who had a limited leasing power reserving the ancient

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* 2 Brown’s Cases in Parl. 514. Tomlin’s ed.]

† 2 Atk. 214.

‡ 18 Vesey, 472.

§ 3 Sim. 396.

|| Young, 377.

¶ 7 East, 279.

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rent, and endorsed by that tenant for life, in these words "a particular of my estate," &c. and handed down to the succeeding tenant for life, who had a like limited power, by whom it was also preserved and handed down amongst the muniments of the estate to the first tenant in tail, was held to be evidence for the tenant in tail, against a lessee of the second tenant for life in order to shew, that the rent reserved by the second tenant for life, was less than the ancient rent which was reserved at the time to which such letter referred. In that case Lord Ellenborough says, after some preliminary observations, "It appears that the former "tenant for life, by whom the paper was then accredited, was not only disinterested in respect of "the then existing rent, but that he had an interest "the other way to diminish the amount of it; then "at this distance of time with the means and knowledge which he had of the fact, and his interest "in declaring it the other way, we think that his "declaration is evidence of the fact to go to the jury. "There are several instances in the books where "the declaration of a person having knowledge of "a fact, and no interest to falsify it has been admitted as evidence after his death." Lord Ellenborough then gives some instances and proceeds thus, "And the reason given is, that it is "hard to prove ancient things, and the finding "the papers in such a place is a presumption that "they were fairly and honestly obtained and reserved "for use, and are free from suspicion of dishonesty; "the paper, therefore, having been found among "the muniments of the family accredited by one "who could not have used it in his own favour, "and preserved by him and the succeeding tenant "for life, against whom it might have been used

“adversely, we think that it was evidence to be left to the jury of the amount of the ancient rent at the time it bears date.” This is a further confirmation and recognition of the doctrine we have been contending for, and the objections rather apply to the *weight* of the evidence than to its *admissibility*.

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As to the operation of the statute of Henry VII. it is, in its terms, sufficiently comprehensive and explicit to resume every thing that had been granted by the Crown since the conclusion of the reign of Edward II.; but it is contended that it has not that effect with respect to the grant made by King Edward IV. to Bishop Sherwood, on three grounds: first, that it did not contemplate corporations; secondly, that the advowson had been the private property of King Edward IV., and that the act only resumed grants of property held *jure coronæ*; thirdly, that the advowson, having become severed and in gross, could never be re-appended to the manor. We admit the distinction between natural and artificial persons; but, nevertheless, the statute of Non-Claim in respect to fines, — (a statute of 10 Charles I. in Ireland), which only speaks of persons and their heirs, and is silent as to corporations, and their successors, was decided to extend to such corporations as have an absolute estate and authority, such as mayor and commonalty, dean and chapter, clerks, and so forth. That is to be found settled in the case of *Croft v. Howell*.* Sole corporations are not included in that decision; not because the word “persons” is not sufficient to include them, but because they have but a limited qualified estate and authority, and their acts required the assent of

* Plowden, 538.

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third persons. In the case before your Lordships the statute is applicable equally to corporations, either sole or aggregate; its words are "by what ever name or names they be named." That must mean the designation of the persons, not merely their names and surnames.

An argument is sought to be derived from the statute of uses, because bodies politic cannot be seised to a use; but the reason why bodies politic are not capable of being seised to a use or trust, is given in *Bacon's Abridgment**, because they are bodies formed at the will of the king, and no further capable than as he wills them; for it is his will that they should purchase for the common benefit and the ends of their creation, and not that they should take any thing in trust for others: and also being incorporeal the Chancery had no process on their persons to compel them to discharge their trust. The words "jointly and severally" have been made use of in the Act of Resumption. But although a corporation cannot be seised jointly, that establishes nothing. The statute uses expressions applicable to all description of persons who could be seised under all former grants; it is not confined to such persons only as are capable of being seised in any particular way, it extends to all who could be seised in any possible way. The principle which ought to govern this case is, that the statute was made for the benefit of the king, its object was to increase the royal revenue, at that period when the king's resources were so much required, in order to suppress the outrages by which the country at that time was so

* Title, *Uses and Trusts*.

severely afflicted, and which outrages are enumerated and adverted to in the preamble of the statute; the principle of construction is to be found in *Comyn's Digest*, title Parliament, 21.—A statute made for the benefit of the king shall be construed most beneficially for him. In *Reinger v. Fogossa** the statute *de prerogativa regis*, 17 Edward II., orders that the king shall have wardship of lands of such who hold of him in chief by knight's service, whereof his tenants are seised in demesne as of fee at the times of their death; which words, demesne as of fee, have two intendments, fee simple and fee tail, and the most common intendment is fee simple; yet it has been adjudged, and is now clear law, that the king shall have as well the lands which his tenant held in fee tail as those which he had in fee simple; which case is as a rule given us, that where the words, "in the gifts of subjects made to the king by parliament have two intendments, they shall be construed most strongly for the benefit of the king."

It is objected that this doctrine does not apply to advowsons, as they are not productive of income to the Crown. But the king's rent books abound with rents reserved from those spiritual possessions. The proviso annexed to the statute in express terms refers to advowsons, and certain corporations are excepted from its operation.

In reference to the argument that this advowson was the private inheritance of King Edward IV., we contend that whether the manor of Rathweir be regarded as having been held by King Edward IV. as private property or as regal property, whether it descended to King Henry VII. *jure coronæ*,

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or *jure uxoris*, is perfectly immaterial; it stands directly affected by the resumptive words of this act of parliament.

The words of the act relate to property whereof any of the king's progenitors, kings of England, were seised in fee simple, or fee tail, at any time theretofore. The introduction of the words fee tail would naturally lead to the conclusion that private property was contemplated by the act, and, on the other hand, that it extends to their coronal property, for it says "whereof any of the predecessors, kings of England, were at any time "seised." From the evidence in the cause it is perfectly manifest that the predecessors of King Henry VII. were seised of this property, because, in the first place, on the attainder of the De Lacy family (the most ancient grantees of the Crown) it reverted to the Crown; it afterwards was re-granted to the Mortimer family, and upon their forfeiture it was resumed into the hands of the Crown. It is stated, that there is a recital in one of the documents of a reversal of that latter attainder. But, be that as it may, it literally comes within the description contained in the Act of Resumption.

Whatever may have been the quantity or quality of the estate which King Edward IV. was seised of in this property, or whatever may have been the mode by which it was acquired, the moment he became king, his interest in the estate became affected and qualified by the annexation of the kingly, to his individual, capacity.

The whole doctrine as to the effect of this junction of the natural person and the body politic of the king is stated in the case relating to the duchy of Lancas-

ter, reported at such length in Plowden, 212., and *Willion v. Berkley*, p. 238. of the same book. That doctrine is briefly this :—“ Not but that the person “ of the king shall sometimes change the course of “ things, and that not in respect of the nature of the “ estate, but of the quality of the person ; as, if a “ common person purchases land, and has two “ daughters and no son, the land shall descend to “ both the daughters ; but if the king purchases “ land, and has issue two daughters, and dies having “ no son, this land shall descend only to the eldest “ daughter, and that is by reason of the quality of “ the king’s person, as it is said before. But if land “ descends to the king, and to another, the king “ shall take only a moiety ; for if he should take the “ whole, he would do a wrong to the other, which “ his prerogative will not suffer him to do. So, if “ land in gavelkind descends to the king and to his “ brother, each of them shall take but a moiety : but “ there, if the king has two sons, and dies, the king’s “ moiety shall not descend to his two sons, but the “ eldest only shall have it by prerogative ; for there “ the quality of the person alters the descent, but “ not the estate, for the estate is as it was before, “ whether it be fee simple or fee tail, so that the es- “ tate shall be in the king as in another ; and there- “ fore the estate before issue had was, before the “ statute, the same in the king as it was in a “ stranger.” The same doctrine is to be found in Coke on Littleton, 15. b.

Before the statute of uses, if a person seised to the use of another became king, he would immediately hold the lands discharged as to the use, and that in consequence of his acquirement of the royal dignity. Chief Justice Holt, in the case of

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*The Queen v. Smith**, says the king can have nothing in his natural capacity if it be not in right of his duchy, or an estate tail, by the statute *de donis*; for if the king purchase lands to him and his heirs, he shall have it in his politic capacity; and wherever the king is said generally to be seised, it shall be intended a seisin *jure coronæ*. The inquisition here finds that King Edward IV. was seised, and on the authority of this case was seised *jure coronæ* at the time of his death.

Whatever may have been the primary or original right of King Edward IV. to the manor of Rathweir and its dependencies, the moment he became king he held it as king, and he granted it as king, and he could have granted it in no other manner than as king—that is to say, by letters patent; and consequently, whether he is to be considered as holding *jure coronæ* or *privato jure*, his right corresponds to that referred to by the statute of Henry VII. as a manor and advowson, “whereof “some of the king’s progenitors, kings of England, “were seised in fee simple or fee tail.”

With respect to the confusion thrown into the case by adverting to that inquisition, it is right to observe that the instrument itself is, on the face of it, historically inaccurate. The daughters of King Edward IV. were not coparceners: Elizabeth should have succeeded alone. Her brothers are overlooked in that document, as though they never had existence; and so is the existence of King Richard III., who probably, as king, possessed this property after the death of Edward IV. But it is perfectly immaterial in what right King Edward IV. was seised of this property, and

whether there was or not evidence (which must mean, of course, *sufficient* evidence) of its having been private or public property.

The contention here as regards this property is, that it was private property. Now, in the thirteenth plea of the Bishop, his Lordship says, "And for a
 " further plea as to the said church in the said fifth
 " count of the said declaration above-mentioned, the
 " said Bishop, by like leave of the Court, saith, that
 " said Plaintiff ought not to have or maintain his
 " action aforesaid thereof against him, because he
 " saith that long before the time in said fifth count
 " mentioned His late Majesty *King Edward IV.* was
 " *seised of said advowson of said church, as in gross*
 " *as of fee* in RIGHT OF HIS CROWN OF IRELAND, to
 " wit, on the 9th of January, in the 9th year of his
 " reign at Killucan aforesaid." It is true that it is only by way of inducement, but it is an assertion of the Defendants on the record, to which we may apply the maxim to be found in the fourth institute, that *allegans contraria non est audiendus*.

Some critical observations have been made upon the term "progenitors," seeking to confine it to a meaning synonymous with forefathers. But is it to be conceived that King Henry VII. intended by this statute to revoke and annul all the grants and favours which had been conferred by his family upon their adherents and friends, and to leave undisturbed the grants and favours that had been conferred by the hereditary and irreconcilable enemies of his house, at least such as he conceived them to be.

But even taking the term in the limited sense to which the Defendants would cut it down, it

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fully answers the description in the act of parliament, because it is evident, on this record, that this property was in the seisin of the kings, Edward II. and Edward III., who were the progenitors, even in that confined sense, of King Henry VII.; Edward III. was the father of John the Duke of Lancaster, from whom the Lancastrian line derived their descent.

But there is an important contemporaneous exposition of the term; for in the same year of the same reign an act of parliament was made in Ireland, in these words: "Item, prayen the Comons, that, for as much as there had been many and divers good and profitable statutes, late made within the realm of England, by great labour, studie, and policie, as well in the time of our Sovereign Lord the King, as in the time of his full noble and royal *progenitors*, late kings of England, by the advice of his and their discreet counsail, whereby the said realm is ordered and brought to great wealth and prosperity, and by all liklyhood so would this land if the said estatutes were used and executed in the same; wherefore be it ordeyned and established by authority of this present parliament, by the assent of the Lords spiritual and temporal, and Commons assembled in the same, that all estatutes, late made within the said realm of England, concerning or belonging to the common and publique weal of the same, from henceforth be deemed good and effectuell in the law, and over that be acceptyd, used, and executed within this land of Ireland, in all points, at all times requisite, according to the tenor and effect of the same."

Now, will it be contended that the people of Ireland, whose lives and fortunes were thenceforward to be regulated and governed by the statutes of England, were to search through the English statutes and select such of those acts of parliament, passed in England, as were enacted merely in the times of the reigns of princes of the House of Lancaster, and to reject all statutes that happened to be enacted when a king of the House of York was on the throne, however publicly beneficial such might be? The absurdity of that argument, and its futility, strongly illustrate the minute and the forlorn grounds upon which it is sought to struggle against the judgment in the present case.

It has been argued that the grant to Bishop Sherwood, by King Edward IV., having disappended the advowson from the rectory, they could not, by any legal possibility, be afterwards reannexed. If by the act of the parties the advowson be disappended from its principal, whether that principal be a manor, or any other species of property, it never can be reappended by any act of the parties. But it may be reappended by operation of law. The doctrine applicable to that part of the subject is to be found in Mallory's *Quare impedit* *, where he lays down that if a man seised of a manor to which an advowson is appendant, leaseth the manor for life, reserving the advowson; this, at common law, made it an advowson in gross, but when the estate for life is determined, it becomes appendant again. Upon this point he refers to *Watson* †, *Hobart* ‡, and *Plowden*. §

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* Page 39.
‡ Ibid. 323.

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§ Ibid. 170. B.

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He also refers to Sir *Moyle Finch's* case * : " If, upon a partition between co-parceners, the advowson is allotted to one coparcener and the manor to which it was appendant to the other; and after one dies, without issue, by which the law unites them again; in this case, the advowson, which was once severed and become in gross, is now become appendant again."

In *The King v. The Bishop of Chester* †, the doctrine is this: " Tenant in tail of a manor to which an advowson is appendant, reversion in the queen in fee, tenant in tail commits treason; then the queen, in reversion, usurps: by this the advowson is in the queen in gross; afterwards tenant in tail is attainted, the advowson is become appendant again; &c. because, by the attainder, the estate tail is extinct and the queen is seised in her reverter." There are many cases to be found in the books establishing the principle, that although no act of the parties can restore the appendancy, yet that, by act of law, the advowson may be again annexed to the principal from which it was severed.

To apply that doctrine to the present case, can there be a more effectual reannexation, by act of law, than that produced by this statute? The only act of severance alleged is the grant by King Edward to Bishop Sherwood of the advowson, separate and distinct from the manor. But this statute, this act of law, this legislative omnipotence (if one may apply the term to temporal matters), has annulled, extinguished, and determined the act by which the temporary severance

* 6 Coke's Rep. 64. A.

† 1 Ld. Raymond, 302.

was created; it has restored the properties to their original union, to all intents and purposes, and to the utter annihilation of all intervening time and occurrences.

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As to the fine said to have been levied by William, the seventh Earl of Clanricarde, to Sir Patrick Mulledy and others. First, the fine was not pleaded, — yet it was offered in evidence, — and although objected to it was received and permitted to go to the jury. The doctrine of estoppel does not in any respect apply to the case, for the Plaintiffs in error here are strangers to that record. There is no mutuality, — and, in truth, the point was given up, upon the argument, in the Court of Exchequer Chamber. It is not pleaded as it should have been, to give it any effect. But the Plaintiffs in error are estopped, by their implied admissions on this record, from relying upon the fine, even supposing that, in other respects, it could have the effect contended for, or even supposing that, for any reasons, it should otherwise have been at all received in evidence.

The date of the alleged fine is the first year of the reign of King James II., that is to say, the year 1685. The declaration alleges that William, the seventh Earl of Clanricarde, the supposed conuzor of the fine, died on the 10th of October, 1687, (two years later than the date of the alleged fine), seised of the advowson in gross, leaving Richard, his eldest son, who became the eighth Earl, and John, his second son, him surviving; that thereupon Richard, the eighth Earl, became seised of the advowson in gross. That, on the 6th of April, 1708, Richard having died without issue, and John, the next in inheritance, being a papist, the advow-

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son vested in Queen Anne, under the Irish act*, to prevent the further growth of popery. Which act provides, that where any person professing the Roman Catholic religion, becomes entitled to an advowson, or to a presentation to a church, that right is, *ipso facto*, transferred at once to the Crown, and there to remain till the Roman Catholic, or his heir or heirs, shall conform in the manner prescribed by the statute. The declaration here asserts that on the 6th of April, 1708, upon the death of Richard, and by the popery of his brother John, it came under the operation of that statute and vested in her Majesty. These are allegations of events in the Clanricarde family, and results from those occurrences, which could by no possibility have taken effect if the advowson had antecedently been passed out of their family by the operation of that fine.

The declaration alleges a subsequent vesting in King George I., under the statute of Anne. Then the seisin of Michael, the tenth Earl, is traversed by the clerk; but his conformity and the revesting the estate in him, by virtue of that conformity which are stated in the declaration, are not traversed; and the seisin of his son John the eleventh Earl of Clanricarde, who inherited by virtue of his father's conformity, is also admitted, at least not traversed. So are the seisins of all the subsequent members of the Clanricarde family in like manner. It is averred in the declaration, that upon the death of the eleventh Earl, Henry the twelfth Earl became seised, and this seisin is not traversed; but the appointment by the deed of March, 1785, under which the Plaintiff claims, is traversed; and this

* 2 Anne.

brings the case within the authority of *Cowlshaw v. Cheslyn* *, where the Court decided that merely traversing the grant by a person averred to have been seised, but whose seisin was not traversed, admitted the seisin, and that evidence to the contrary (as the fine here) ought not to have been received.

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These events then, so incompatible with the imputed operation of the fine, are admitted by the pleadings; but it is sought to throw an increased burthen of proof upon the Plaintiff, by reason of a general traverse pleaded by the clerk, namely, to the allegation that it belongs to the Plaintiff to present, and also the averment that he is not possessed. With respect to that traverse of its belonging to the Plaintiff to present, the ancient reports abound with cases of *quare impedit*, which appears to have been a form of action very much resorted to in former times. There are also numerous pleadings in this form of action set forth at length in the old books of entries. There are several books of pleadings, ancient and modern, both when the principles and rules of pleadings were most strict and when they were more relaxed. There is not an instance in the whole series of these distinguished works of a declaration in *quare impedit* that did not conclude with an averment that therefore, by reason of the facts antecedently stated, it belongs to the Plaintiff to present. In the whole series there is not one instance of a plea in these terms.

Two cases have been relied upon, but do not deserve the name of exceptions to the principle,—the case of the *Grocers' Company* † and the case of

* 1 Crompton & Jervis, 48.

† 3 Wilson, 214.

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Thrale v. The Bishop of London.* The case of the *Grocers' Company*, where that passage is introduced, is in the replication; it is not in the plea. It was a traverse by the Plaintiff himself in his replication, that it belonged to him to present in a particular turn. The Defendants alleged that the Plaintiffs had missed their turn, that they ought to have presented in the second turn,—that this being the third turn it now became the right of them, the Defendants, to present; and, in reply to that, the Plaintiff closes his replication by a traverse that it belonged to him to present in the second turn. There is a *dictum* subjoined to that case of *De Grey C. J.*, from which it might be inferred that such a traverse as that would not be disapproved of by him. But it is remarkable, that in the report of the same case, by Sir *William Blackstone* †, that imputed *dictum* of Lord Chief Justice De Grey is not adverted to.

The case of *Thrale v. The Bishop of London* is also a traverse in a replication, denying that it belonged to a particular person to present upon a particular event; and in that case, it was deemed so immaterial a traverse, that the other parties passed it by in the rejoinder, and traversed the inducement to it contrary to the principle of pleading that a traverse cannot be had upon a traverse; nevertheless, the traverse was allowed to be a good one from the immateriality of the traverse in the replication. These are cases of mixed law and fact which are traversed; whereas the allegation at the conclusion of a declaration in a *quare impedit* is a mere inference of law deduced from a multitudinous statement of facts. This case strongly illus-

* 1 H. Blackst. 376.

† Vol. ii. 770.

trates the point, because here we have been obliged to deduce facts almost from the first invasion of Ireland. So the case stands upon authority. With respect to the effect which it ought to have in relation to the evidence, the Defendants below have traversed specially every allegation which they required to be proved, and the Plaintiff below has established all those allegations by evidence. The general traverse, if it puts the Plaintiff upon any proof, would demand proof of the whole matter of the count; and if so, what can be the supposable use of a number of special traverses introduced to the enormous extension of the pleadings and a vast increase of expence? It would be giving to this novel plea all the effect of a general issue in a form of action in which there is no general issue, or at least only a general issue which admits the Plaintiff's title, and merely controverts the charge of disturbance. That no general issue is allowed in this form of action, appears from Mallory, page 210., from the case of *Reid v. Brookman** and the case of *Colt*, and *Glover v. The Bishop of Litchfield and Coventry*†, and also from the general doctrine of Mr. Stephen's book on pleading, page 173. It is manifest that the pleader himself here did not calculate upon such an effect from his plea, because, if he had done so, he certainly would not have introduced more than 120 special pleas in aid of it.

The pleas traversing that it belongs to the Plaintiff to present, and that the Plaintiff is possessed, were compared to pleas in ejectment. There the Plaintiff proceeds upon a right of entry within the last 20 years. It has been asked, how does the admission of this plea and the extended effect sought

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* 3 Term Rep. 158.

† Hobart, 162

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to be given to it injure the Plaintiff, seeing that the Defendant may specially traverse every allegation in his declaration? The simple answer to that is this—if the Defendant were so to abuse the indulgence of the Court by unnecessary or vexatious, or multitudinous traverses, the rule for liberty to plead several matters would be rescinded, as was done in the case of *Gully v. The Bishop of Exeter**, where a numerous set of pleas of this description were referred to one of the learned judges to be revised, and his Lordship struck out a great many of them. He retained several, and, amongst the rest, one with respect to the possession similar to the one here. But if his Lordship was of opinion that that opened the whole case to the Defendant, and threw the entire burden of proof of all the allegations upon the Plaintiff, his Lordship would have decided that that single plea would have sufficed, and he would have struck the whole out save and except that one.

So far as the pleas are to be found in the pleadings of the clerk, we submit that they were not admissible at all, and upon this principle—that the effect of such proof would be to shew a title out of his patron; at common law, the clerk was not allowed to plead as to the title to the patronage at all; he had no interest in the patronage. If the patron was not named in the writ, the clerk might have pleaded in abatement; and then where the patron was brought into the action, he had the means and opportunity of defending both his own rights and those of his clerk as derived through him: still the clerk was exposed to this disadvantage, the patron might be supine or indifferent, or there might be

* 5 Bing. 171. 2 M. & P. 266.

collusion between the patron and the Defendant, or there might be false pleading. To remedy this mischief, the statute which is called the statute *De Clero*, the 25 Edward III. ch. 7. was passed, enabling the clerk to defend the title of his patron; for which purpose he is not only bound to commence his plea by stating his possession, that is, that he is parson imparsonnee, but he must also set forth on whose presentation he is that parson; and that allegation is material and traversable, and then he may defend his patron's right or his patron's title, but not by shewing title out of his patron: he cannot state that he is parson imparsonnee on the presentation of A. B., and then shew a title in C. D., although in point of fact C. D.'s title would effectually defeat that of the Plaintiff.

Accordingly, it is laid down in Mallory, page 213., referring to Hobart 320., that "even though the title that the parson sets up in the King or J. D. after he hath shewn himself parson imparsonate of the presentation of J. S., will destroy the Plaintiff's title, that shall not avail him." The same doctrine is fully established in Hobart 320. Here the alleged fine, if it had any operation at all, would equally have the effect of conveying away the property from the Bishop of Meath, as well as from the House of Clanricarde; that is, it would have the effect of conveying it away from the Bishop by whose collation the Defendant pleads that he is parson imparsonnee of this benefice. Indeed, it would appear, that the attempt to enforce this evidence is a strong and implied admission of the absence of title in the clerk's patron, inasmuch as no act of an Earl of Clanricarde could convey

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the advowson, if in truth it belonged to the Bishop of Meath.

An argument perhaps more of a popular character than a legal one was pressed into the discussion of this case, founded upon an alleged long-continued exercise of right over this benefice by the Bishops of Meath. From the record itself, it will appear that that allegation is totally unfounded. But assuming for a moment that it were otherwise, and that numerous collations had been made by the Bishops of Meath, it would not advance the argument in favour of the Bishop.

Bishops have various duties to discharge, and one of the most important is the providing for the spiritual concerns of the inhabitants of parishes under their charge. It is the bounden duty of the Bishop, when a benefice becomes vacant, to supply the charge provisionally, so as that the flock shall not sustain any spiritual privation, and he may do that within the six months which are allowed to the patron to present; but if the six months elapse, he may and ought to appoint permanently, that is, during the life of the incumbent whom he selects. But in either case he acts as and for the patron, and in his right, place, and state. He is a mere trustee: he is in some books called the attorney for that purpose of the patron, and therefore his interference in filling a vacant benefice is by no means necessarily referable either to title or patronage.

This doctrine is fully sustained by *Green's case**, where it is ruled, "If the ordinary collates within six months and his clerk is inducted, yet the rightful patron cannot be put out of possession,

* 6 Coke, 29 b.

“ nor put to his *quare impedit*, but may present,
 “ by which it appears that the very patron without
 “ a presentation cannot be put out of possession.”

Again, in Boswell's case *, “ If a bishop collates
 “ without title to a church presentable and his
 “ clerk is inducted, yet that should not put the
 “ rightful patron out of possession, for that is but
 “ a provision for the celebration of divine service,
 “ in the mean time, till the patron presents, and
 “ that belongs to his office, and therefore shall not
 “ put the patron to a *quare impedit*, but his pre-
 “ sentee ought to be received without any process
 “ of law, and therefore in such case, no plenarty
 “ by collation can be pleaded against the patron,
 “ for no plenarty is available in law against him
 “ who has title to present, but only plenarty by
 “ presentation.” That is, by presentation by an
 adverse patron.

In Hobart's Reports, page 302., it is said “ Colla-
 “ tion makes no disappendency nor plenarty, but
 “ the church remains void, and the patron may
 “ not only bring his *quare impedit*, but present upon
 “ the bishop's clerk seven years afterwards.” In
 Wood's Institutes, page 160., that principle is
 extended, for it is stated, that “ the right patron
 “ may at any time bring his writ to remove the
 “ person collated.” And in the case of *The Queen*
v. The Archbishop of York †, it is decided that not
 two, three, or more collations, give any possession
 of an advowson to a bishop, “ though he should
 “ collate not as patron, but as ordinary.” That is,
 that he cannot usurp.

Mallory, in page 26., says, “ The right of present-
 “ ation in the patron seems to be such as that even

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* 6 Rep. 50. a.

† 1 Leonard, 226.

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“the ordinary’s collation is but in right of the patron, and by his default, and that even when the king presents by lapse, he does not present as supreme ordinary, but as supreme patron, and his presentation through the patron’s default is an affirmance of the patron’s right, and maintains the possession of the true patron.” The Plaintiff in *quare impedit* may count upon a collation as effectually as he can upon the presentation by himself, if it be a collation upon a lapse.

In page 118. Mallory says, “Lapse is not an interest naturally as the patronage is but a mere act or office of trust reposed by law in the ordinary or metropolitan, and lastly in the king, the end of which trust is to provide the church, in default of the patron, and yet as to him and for his behoof, so that the ordinary, or he that is to present by lapse, is as it were *negotiorum gestor*, or a kind of attorney made by law to do that for the patron which it is supposed he would do for himself, if there were not somewhat to hinder him, and therefore the collation by lapse is in right of the patron, and for his turn, and he shall lay it as his possession for an assize of darreign presentment.”

Lord Brougham.—Suppose instead of presenting after six months, the bishop had been found again and again for a series of avoidances, to present within six days that act of user would not be equivocal. Your argument is that the books all say that a collation after six months may be counted upon by the patron to prove his right, and if relied upon by the bishop, does not avail for him that it is an equivocal act—that it is not necessarily adverse, for it may be by him in his right of

the patron, or it may be by him as attorney of the patron; but that observation is not applicable to a series of presentments by the bishop within the six months.

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For the Defendant in error.

If he collates within six months to a benefice that is presentable, it is a nullity to all intents and purposes as regards the patron's right of presentation.

Lord Brougham. — You are now upon the effect of the user of the bishop for a series of years collating, and I agree that such series of collations at the end of six months is an equivocal act. It may be referable either to his title as patron, or it may be referable to his office as attorney of the patron; but I am supposing a series of presentments, each within three months of the avoidance: how in that case would you refer it to the bishop's title, *quasi* attorney of the patron? Would not that have some avail in the argument between him and the patron?

For the Defendant in error.

A collation within six months is clearly an equivocal act, because he is not then entitled to collate for lapse; and it may be that he is assuming either to collate as patron, or provisionally till the patron shall nominate.

Lord Brougham. — If you will satisfy us that the bishop has any right within six months to provide for the living.

For the Defendant in error.

The authorities prove that it is his duty not to suffer the wants of the parish to be unprovided even for six months.

Lord Brougham. — He would not do it by

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collation; no bishop would, in order to supply the vacancy within six months, present a clerk as for induction.

For the Defendant in error.

It is not usual, but he may do that if he pleases; and the moment the patron comes forward with his presentee, there is an end to the collation. It is always open to impeachment by the patron; but if the bishop allows the six months to elapse, and he then collates, but does not in his book state that he so collates by lapse, then it is a trespassing upon the rights of the patron, which the patron cannot *pro hac vice* disturb; but the bishop in that case is bound in common justice to state in his books that he collates upon the lapse of the patron, and then there is a recorded admission of the Plaintiff's title, and that is an act, the neglect of which is universally complained of in Ireland: that the collations which appear upon the bishops' registries do not set forth whether they are in any assumed right of patronage in the bishop himself, or on behalf of a negligent patron.

But it is material to give attention to the actual state of the facts, as appearing upon the record. The utmost diligence that has been exercised cannot trace out more than nine instances in which this benefice has been filled. This property was originally that of the D'Arcy family; and accordingly on the 13th of March, 1529, we find a person of the name of Dermott Martin presented by William D'Arcy. That presentation recites that it was upon the demise of the preceding incumbent, who was Thomas D'Arcy. Then the property comes to King Henry VIII., and he exercised the right of seisin, by presenting on the 18th

of August in the 24th year of his reign, William Cocks, and presenting him *pleno jure*. In 1615, we find the entry of Mr. Carter being the incumbent, Lord Clanricarde being the patron; and in 1626, we have Edward Donnelan presented by Richard, fourth earl of Clanricarde; then in 1660, comes Barry's presentation by the grant of the Lord Clanricarde; and in 1691 there is the institution of a Mr. Warburton by the Crown, upon the promotion of the preceding incumbent, it being the prerogative of the Crown when an incumbent is promoted to fill the vacant benefice. These are seven out of nine instances; there remains but two — one of those the usurpation of Bishop Dopping, who collated his own son in 1695; and that of the last incumbent, Mr. Wynne. Two writs of *quare impedit* were executed against Bishop Dopping; he extricated himself from that difficulty, not by the verdict of a jury or the judgment of a court, but he complained to the House of Lords of a breach of privilege committed in his person against the house, and the attorney was brought to the bar of the House of Lords, and only discharged upon making an ample apology.

If the case rested upon the title proved, independently of the documents found at Lowton House, there was enough to have induced any court and any conscientious jury to find a verdict for the Plaintiff in this action.

It is competent for your Lordships, as the Court of dernier resort in appellate jurisdiction, to look to the whole of the evidence as set out upon the record; and if your Lordships are satisfied, that independently of any evidence to which any objection can be urged, a title is legally established in favour

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of the Plaintiff, to confirm the judgment that has been pronounced. There are several cases in which that principle appears to have been recognised.

In the case of *Lord Teynham v. Tyler**, the Court decided that they would not grant a new trial upon the ground of improper evidence having been admitted, there being enough on the report of the learned Judge to satisfy them that the verdict was right, independently of the objectionable evidence. So, in *Edwards v. Evans*†, the same principle was adopted upon a rejection of evidence which ought to have been received. In this house, also, in the case of *Maccabe v. Hussey*‡, this doctrine is stated: — “This house, sitting as “a court of appeal from a decree of the Court of “Chancery, where evidence has been improperly “rejected, will look at that evidence, and see “whether or not, if admitted, it ought to have affected or varied the judgment.” Then upon the authority of the case in 6th Bingham, I submit the converse of that proposition. I do that, however, not by any means admitting that there has been a particle of evidence here received which should have been rejected.

“So, a court of error will look to the whole “evidence on both sides to see whether it be sufficient to sustain the verdict, although the exception referred to the Defendant’s evidence “alone.” They will travel out of the exception to see if they can sustain the judgment. That is the case of *Vines v. The Corporation of Reading*.§

The following observations were made by the

* 6 Bingham, 561.

† 3 East, 451.

‡ 5 Bingham, N. S. 715.

§ 1 Young & Jervis, 4.

Lords Brougham and Lyndhurst in the course and at the conclusion of the argument.

Upon the question whether there was sufficient evidence that the house called Dopping House was the depository of the Dopping family papers; whether Mrs. Dopping, who was said to reside there, was a relative or connection of the family of the Bishop of Meath of that name; and whether it was the family mansion, it was said — that if parties do not cross-examine, but leave the evidence vague and loose for the purpose of making objections afterwards, that is not a practice to be encouraged.

As to the proof of the deed found in the house in question, it was said — that it was unnecessary to prove an ancient deed by comparison of the handwriting of the period, if it was shewn to come out of the proper custody; and if otherwise, the handwriting would be immaterial, as it would not have been evidence against the successor.

Upon the questions whether the grant of the next presentation ought to have been in the custody of the bishop, and as to the case, the following observations were made.

A man keeps his title to an advowson because he presents *toties quoties*; but if it be the next avoidance the whole grant is spent in the grantee upon the presentation; and he might naturally permit the bishop to retain it, and indeed the custody of it might be necessary for the bishop's protection, as the owner of the advowson might send another presentee to the bishop, who would not have the best evidence of the former presentation; at all events, the bishop's family would have the custody of the case, if not of the deed. Then if

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the house in question is to be considered the family house of the bishop and his descendants, that might be conclusive upon the question, if such case and custody is evidence against the successors. The grant is good for nothing without the case. The custody of the bishop is the proper custody of the case; then if the case is rightly in the bishop's custody, that is connected with the grant, for the case refers to the grant. The objection as to custody does not seem to apply to the case.

Upon the question as to the right to compel production of the case, the decision in *Radcliffe v. Fursman* was suggested to the counsel, and it was said that the bishop might have been compelled, by order of the Court of Chancery, to produce the case which he had laid before counsel; that attempts had been made to apply the doctrine to suits actually depending; but that was resisted by the Court in the case of *Bolton v. The Corporation of Liverpool*. That harsh as the practice may appear, it is accordant with the principles applied in courts of equity upon bills of discovery, in which the plaintiff has a right to wring the conscience of his adversary, and to inquire what he asserted in conversation with other persons, even with his attorney. The case of an action pending is an exception; but before litigation, although you cannot ask the attorney or counsel what passed in private consultation, you may ask the client. In *Bolton v. The Corporation of Liverpool* the case did not so much turn upon its being a case of tolls, or matter of public interest, as that it was within the common rule of equity as to discovery. The effect of the decision is that you have no right to that which touches the title of your adversary only, but that

if it is part of your own title, or a title in common, the production may be compelled : but here was no question of compulsory production ; the document being produced, the question is whether it is admissible in evidence. The decisions in courts of equity shew that where a case has been laid before counsel, it is the inveterate practice of those courts, acted upon daily, that in any proceeding except the suit actually pending, the Defendant may be compelled, by a bill of discovery, to produce the case laid by him confidentially before his counsel, but not the answer nor the opinion of the counsel ; a rule, apparently, not very consistent.

The exception of *lis mota* cannot be sustained, except with reference to a suit pending at the time or in immediate contemplation. The documents if ordered to be produced in a court of equity must be evidence at law ; if there is any objection to them as evidence, that would be a reason against the discovery, and might prevent the production in equity. *Preston v. Carr* is a strong case on this point. *Greenough v. Gaskell* was a case of solicitor charged with fraud. It may be difficult in principle to distinguish between what passes in the consultation room of the counsel upon a verbal consultation, which the client may be compelled to disclose, and the opinion given upon a case which is a written consultation. The question has not been pressed in courts of equity on this special point of argument.

A declaration made by bishops or other persons in their corporate character is evidence against successors, although it relates to facts which occurred before their existence, since they might have seen documents, and had before them proofs which have

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since perished. If Bishop Dopping in the case asserts that a particular person was presented to the living, he might have seen the instrument of presentation. If he says that he was in consequence instituted, he might have seen the instrument of institution, or an entry in the book of the bishop which might have recited on whose presentation he was instituted, and thus have acquired competent knowledge of the facts, according to the rules of evidence, although the facts happened before his birth. In this case it seems he saw the person in actual possession of the living.

As to the operation of the statute 10 Henry 7. it was observed, that as it was enacted that "all the feoffments, grants, &c. enumerated were to be deemed void and of none effect in law," it could not reasonably be argued that what had been done with respect to the manor and the advowson had the effect of a severance, since by a fair construction of the act, the effect upon the grants, &c. was to make them utterly void, as if they had never been made.

As to the argument grounded upon the use of the words "Great Seal," as applying only to the possessions of the Crown, it was suggested that the words did not override the whole clause, the resumption applying first to all manors, lordships, castles, garrisons, fortresses, advowsons of churches, &c., whereof the kings of England were at any time seised in fee simple or fee tail from the time of Edward II., and then by a clause very distinctly severed all feoffments, gifts in tail, grants, &c., as well by authority of parliament as by letters patent, made under the Great Seal of England or Ireland, &c., that the former gifts independently

of and as well as the latter, viz. the feoffments, &c. under the Great Seal are declared to be null and void from the reign of Edward II.

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As to the admissibility of the fine in evidence it was said, suppose the traverse puts in issue all the allegations in the declaration, it is not competent to the Defendants to prove an independent fact in answer to those allegations. The duty of the Plaintiff is only to prove these allegations: how then could the fine be received in evidence, unless it had been pleaded, assuming, as it is contended that by the traverse all the facts stated in the allegations of the declaration are put in issue? What is it incumbent on the Plaintiffs to prove but those allegations? The defendant cannot cross him by a fine which he has not pleaded.

Lord Brougham.—My Lords, this case is one of considerable importance, not only with respect to the interests involved in it, but the points of law raised in the Court below, and on which your Lordships have the judgment of the learned Judges in Ireland, before whom the question came in its different stages, and who pronounced judgment against the Plaintiff in error. It becomes now my duty to state to your Lordships the questions which it appears to be expedient you should put to the learned Judges who have assisted you in listening to the argument of this writ of error, for the purpose of getting the benefit which their learning and experience in dealing with the points made at the bar are calculated to throw on the present question. It is obvious from the course of the argument which has been held before you, that there may be said to be three great branches of

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this case, to all of which I propose shortly to direct the attention of the learned Judges, in the few observations I am about to make, and which shall be confined simply to an explanation of the matters in question, in order that there may be no part overlooked of what has been urged by the counsel at the bar, and that you may see the force of the questions which the points of argument suggest.

The most important question relates to the admissibility of certain evidence under the issues joined. Although there were many pleas, and a great number of issues joined on those pleas the jurors were discharged without finding any verdict except as to the issues upon the 5th count.

The first of those three branches relates to the admissibility of certain evidence; the second relates to the power, force, and effect of a certain statute; and the third to the power, force, and effect of a certain fine.

If any other point has escaped me in this enumeration, I should wish to have it suggested before the questions are finally settled for the learned Judges; it is very material no one point should be left out. As it is impossible to anticipate what may be the result of the consultation of the learned Judges, or of the opinions subsequently formed by your Lordships on the result of that consultation upon the first question, as to the admissibility of certain evidence, it becomes necessary to request the attention of the house and of the learned Judges, in the first instance, to all those three branches, because, although undoubtedly if the first should be decided in one way, the others would cease to be material, and the whole question would be disposed of for the present; yet, if that

first question should be decided another way, the other questions must necessarily in succession arise.

The first of these questions is, as to the admissibility of the evidence of the deed of grant from a certain Lord Clanricarde, (who at the time was seised of the advowson in question)—of the next presentation on the next succeeding avoidance of that living to an individual who presented a clerk to the then bishop, and whom the bishop, it is said, instituted; that deed was found in a certain place: And the question arises first—Ought that deed to have been admitted in evidence or not, regard being had to that, which forms the principal ground of objection to its reception, namely, the defective proof of its custody. Perhaps a difficulty might arise even if the evidence of custody were perfect as to the binding nature of that on the present bishop, the successor of the then Bishop Dopping; but, however, on that branch the principal point is the custody. I have an inclination of opinion upon that subject. I have not often in my experience on these questions, which is very much inferior to that of many of the learned persons assisting your lordships, but I do not recollect to have observed any case in which there was so scanty a proof, compared with that which is usually required in trials as a security to defend the rights of parties and protect courts from misapprehension or from fraud in the fabrication of evidence. I do not recollect any case in which those rules which have been adopted to defend parties and protect the courts in receiving old instruments, have been so little attended to. The most scanty evidence of custody, and of acts arising from custody, was produced; though it is certainly doing no more than justice to

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say, that it was the fault of the party now objecting to the defective proof of custody, that it was so little, inasmuch as they did not cross-examine to it; and it is past all doubt that a party is not allowed to lie by at the trial when they might have got answers which would have explained the evidence, thus to shut the door in the face of the evidence, and then insist that the proof was defective.

The next question relates to a case found in the same repository, which in some respects raises a doubt on other grounds as to its admissibility, and raises again the question of proper custody, but not as it appears to me to the same degree in which the deed raises it. It does not follow, although the evidence as to the deed was not sufficient, that the evidence as to the case might not be sufficient, because undoubtedly it is a case respecting the affairs of the diocese, and is laid before counsel by a bishop then having the see. That is the second point, and raises several questions, all of which fall within the comprehensive question, admissible or not admissible, which I have framed on purpose to lay before the learned Judges. The admissibility of that sort of evidence to a certain degree has been tried by questions raised on bills in equity, for discovery being filed against parties to compel them to produce cases which they had laid before their own counsel. The practice has been subjected to many observations made at the bar; and it is, perhaps, to be lamented that there ever was such a decision pronounced or affirmed by this house, which is the court of last resort, as the decision in that case of *Ratcliffe v. Fursman*, the effect of which is, that when a man has laid before his counsel a confidential statement, for the purpose of enabling

himself to prosecute his claim or defend his possessions, another person in another suit, provided he makes a case for a decree, generally is enabled to extract from that party cases so prepared, and laid confidentially before his counsel.

It is, perhaps, much to be lamented that that should be law; but the law is inveterate — it is sanctioned by a decision solemnly pronounced by this house in that case; it has always been acted upon since, and acted on to a great extent until the three late cases of *Tooke v. Paisley*, *Hughes v. Bidulph*, and *Bolton v. The Liverpool Corporation*. In all these cases it has been acted on less vigorously, and to a smaller extent, and the right of the party has been confined within narrower bounds than ever was done in former cases. The house is bound by the decision in *Ratcliffe v. Fursman*, and the only question is, whether any thing is to be extracted from the limitations established by subsequent authorities, which will enable you to qualify the application of that principle as far as it is applicable to the admissibility of such a case as this.

A question for consideration also might be raised, whether the case, if the production be compelled, or the evidence admitted, is to be accompanied with explanation, which may be given by the answer, or whether it can ever be used by a jury without the answer being read. Then it is to be considered, whether that does not differ from this case, and even now exclude it. If acting on the advice of the learned Judges, or in any other way, we shall be of opinion that the Court below was wrong in admitting the evidence, either of the case or the deed, and that the party bringing a bill of exceptions tacked to his writ of error, ought to prevail on those excep-

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tions, I hold it to be utterly immaterial, and not to be worthy of putting a question to the learned Judges, to inquire what would be the effect of that evidence if it were received, or what would have been the effect of shutting out that evidence; for whatever may be the effect of the decision in the case of *Teynham v. Tyler**, or any other case of the sort, where the court is called on to exercise its discretion in granting a new trial, I believe all the Judges are of opinion that the question is on the record by a bill of exceptions brought here tacked to a writ of error; it is error on the record, and therefore a *venire de novo* would be granted as a matter of course.

The second branch of the case relates to the effect of the statute of the 10th of Henry VII., upon the grant of Edward IV. That must be discussed on the merits, and it is only necessary to lay before the Judges a question, conveniently framed, to take their opinion on the effect of that statute upon the grant.

Another question arises as to the effect of the statute in reappending the advowson to the manor of Rathweir.

This brings us to the third branch of our case: the first question on that point arises partly on the pleadings, partly on the admissibility, and partly on the effect of the evidence, whether in that state of the pleadings it is admissible. Now on that also I shall only state to your Lordships further the sort of questions which it is fit to propose, and it is nearly the same question as with respect to the deed. With respect to the fine levied of the manor and advowson, the question resolves itself into three: first, whether

* 6 Bing. 561.

or not the fine (stating the circumstance of the fine being levied by the party whose estate the present party, the Defendant in error, has — the Plaintiff in the *quare impedit*) — whether the fine being so levied is admissible in evidence upon the issues raised on the 5th plea in this state of the record. In consequence of the argument in reply by the counsel for the Plaintiff in error, the second question which it is material to put, is whether if receivable it ought not to be left to the jury to say, whether the effect and force of that fine was a bar to the action; and the third, supposing it is on the record, is, whether the force and effect of that fine is sufficient to bar the action.

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These questions, the first two on the admissibility, the second two on the force of the statute, and the last three on the fine levied, will, as far as I am advised, exhaust the enquiry.

Upon the motion of Lord Brougham, the following questions were put to the judges:

“ In *quare impedit* to recover the presentation
 “ to the church of K., the advowson whereof is
 “ claimed to be part of the temporalities of the
 “ Bishop of A., a deed was offered in evidence pur-
 “ porting to be brought from the custody particu-
 “ larly described in the bill of exceptions: And
 “ also a case purporting to be a case stated for the
 “ opinion of counsel on the part of a former Bishop
 “ of A. and brought from the same custody:

1. Is the deed admissible in evidence against the successors to the Bishop of A. in that see?

2. Is the case admissible in evidence against the same party?

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An act was passed in 10th Henry VII., (see page 348.) and a grant of the advowson of C. by King Edward IV., was made to Bishop of A. (see page 338.)

3. Did the said act of Henry VII. avoid the said grant of Edward IV.?

4. Did the said statute re-append the advowson to the manor, whereto it was appended before the grant?

In a *quare impedit* brought by C. against the Bishop of A., it is pleaded (amongst other things) (see pleas to 5th Count, page 337.), on which issues are joined. On these issues a fine is tendered in evidence levied by B., whose estate C. hath (see page 350. and appendix 84.)

5. Is such fine admissible in evidence on the said issue?

6. If received, ought it to be left to the jury to say, whether it barred the action of *quare impedit*?

7. Did the fine bar the action of *quare impedit*?

On the 25th of May, 1835, the Lord Chief Justice of the Court of Common Pleas delivered the unanimous opinion of the judges present, upon the said questions of law, as follows: —

“ With your Lordships’ permission we shall reverse the order of considering the first and second questions, and give our answer to the question, whether the case was admissible in evidence. For as the deed and the case were found at the same time, by the same persons, at the same place, and indeed in the very same parcel of papers, the question of admissibility so far as it depends on the custody is precisely the same

“ with respect to both; but a difficulty which might
 “ exist with respect to the deed, but which forms
 “ no ingredient in the consideration of the admissi-
 “ bility of the case, will be avoided if the case
 “ should be held to be receivable in evidence;
 “ and upon the question, whether the case stated
 “ for the opinion of counsel is admissible, the judges
 “ who have heard the arguments of counsel upon
 “ this point, are of opinion, that it would be admis-
 “ sible in evidence on the trial of the *quare impedit*
 “ above supposed to be brought; for although two
 “ of my learned brethren, Mr. Justice Park and Mr.
 “ Justice Coleridge, did at one time feel doubts as
 “ to the propriety of admitting such evidence, I
 “ am authorized by them to state, that upon further
 “ consideration, those doubts are removed, and that
 “ they agree in opinion with the rest of the judges.

“ It is not necessary to determine on the present
 “ occasion, whether the supposed Plaintiff in the
 “ *quare impedit* could have compelled the Bishop,
 “ the supposed Defendant, to produce in evidence
 “ the case which had been stated for the opinion
 “ of counsel by his predecessor, either by any pro-
 “ ceeding in a Court of Equity or otherwise; or
 “ whether the counsel or attorney who drew up
 “ the statements contained in that case, could have
 “ been compelled to disclose such statements,
 “ either as against their client or the successor of
 “ their client. The present inquiry stands unem-
 “ barrased with the consideration of that question;
 “ for the case stated for counsel has actually come
 “ into the possession of the Plaintiff in the *quare*
 “ *impedit*, and the Plaintiff himself produces it, at
 “ the trial of the cause, as part of his evidence, and
 “ the question is the same as if a case with the

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“ opinion of counsel which one party was not bound
 “ to produce, had found its way by accident, or
 “ otherwise into the hands of the other party. Upon
 “ this view of the subject it appears to us, that the
 “ only considerations which arise upon the produc-
 “ tion of the case, are two: First, whether the
 “ custody in which it is found is such as to stamp
 “ it with authenticity as a genuine document;
 “ and secondly, if it is to be taken to be genuine,
 “ whether the statement of the facts contained in
 “ it are admissible against the interests of the suc-
 “ cessor of the former bishop, who made or caused
 “ to be made the statement contained in the case.

“ The first, and indeed the principal question is,
 “ whether this document was found in such custody
 “ and under such circumstances attending the find-
 “ ing of it, as to give it authenticity as being a
 “ case really stated by the authority and on the
 “ behalf of a former bishop of the same see.

“ Now, before we consider the facts relating to
 “ the finding of the case, as stated in the bill of
 “ exceptions to which we are referred; we cannot
 “ but observe, that the statement itself in the bill
 “ of exceptions is very loose and inaccurate; but
 “ we think in construing the statement contained
 “ in a bill of exceptions, we are to consider our-
 “ selves placed in a situation analogous to that of
 “ a jury, and that like a jury we are bound to make
 “ every legal presumption from the facts stated,
 “ and every reasonable inference which those facts
 “ will bear.

“ Supposing facts, therefore, are stated by the
 “ Plaintiff’s witnesses in an uncertain or ambigu-
 “ ous manner, as the Defendant’s counsel have
 “ neglected by cross-examination, of which they

“ had the opportunity to render the statement
 “ more clear and certain to remove any ambiguity
 “ of expression ; it is not competent for the De-
 “ fendant below, in this advanced stage of the pro-
 “ ceedings, to make his stand upon the looseness
 “ and ambiguity of the testimony of which he is to
 “ a considerable extent himself the cause. In such
 “ case, the judges can only, as judges of the fact,
 “ and with the eyes of common men, endeavour to
 “ discover the truth through the vagueness and
 “ uncertainty of the statement, and then only to
 “ act upon it where they can feel a solid foundation
 “ on which they can rely. This observation will
 “ dispose of much of the objection which has been
 “ made in the course of the argument against the
 “ testimony of the witnesses, who depose to the
 “ time, place, and manner of the finding of the case
 “ and of the grant ; and looking at the statements
 “ in the bill of exceptions, we think the fair result
 “ of the evidence, is that both the documents to
 “ which exceptions have been taken were found
 “ tied up together with other papers relating to
 “ the see, in a house called Lowton House, which
 “ was the family Mansion House of the Doppings,
 “ that is, the Mansion House of the family of which
 “ Anthony Dopping, formerly Bishop of Meath, was
 “ one member, and of which the witness who gave
 “ the testimony was another ; that this house was
 “ occupied by a member of the Dopping family,
 “ at the time the papers were found there ; and
 “ lastly, that it was the house in which the Dop-
 “ ping family papers were kept. There is not one
 “ of these facts vague, as they appear at present,,
 “ which might not have been cleared from all am-
 “ biguity by a very little cross-examination, if they

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“ are founded in truth; and on the other hand, not
 “ one which would have stood the test of such
 “ cross-examination if untrue. Other parts of the
 “ bill of exceptions corroborate and confirm the re-
 “ sult of the evidence as above stated. That there
 “ was an Anthony Dopping, who had been Bishop
 “ of Meath, that he had some family, and that he
 “ had collated his son to the living now in dispute,
 “ is proved by documentary evidence set forth in
 “ the bill of exceptions, which documentary evi-
 “ dence was contemporaneous with the fact and
 “ cannot mislead. Again, as the original docu-
 “ ments do not appear before the judges in a bill
 “ of exceptions, but the transcript only is set out
 “ upon the record, it is the proper and necessary
 “ intendment that there is nothing upon the face
 “ or in the condition of the documents themselves
 “ which excites suspicion as to their genuineness;
 “ for in this stage of the proceedings credit must
 “ be given to the Court below, that they would
 “ not have allowed the documents to be read if
 “ they had borne upon their face, or in their con-
 “ dition, any evidence against their admissibility.

“ The result of the evidence upon the bill of
 “ exceptions we think is this; that these documents
 “ were found in a place in which, and under the
 “ care of persons with whom, papers of Bishop
 “ Dopping might naturally and reasonably be ex-
 “ pected to be found, and that is precisely the
 “ custody which gives authenticity to documents
 “ found within it; for it is not necessary that they
 “ should be found in the best and most proper
 “ place of deposit.

“ If documents continue in such custody there
 “ never would be any question as to their authen-

“ ticity ; but it is when documents are found in
 “ other than the proper place of deposit that the
 “ investigation commences, whether it was reason-
 “ able and natural under the circumstances in the
 “ particular case to expect that they should have
 “ been in the place where they are actually found ;
 “ for it is obvious, that whilst there can be only
 “ one place of deposit strictly and absolutely pro-
 “ per, there may be many and various that are
 “ reasonable and probable, though differing in de-
 “ gree, some being more so, some less ; and in
 “ those cases, the proposition to be determined is,
 “ whether the actual custody is so reasonably
 “ and probably to be accounted for, that it im-
 “ presses the mind with the conviction that the in-
 “ strument found in such custody must be genuine.

“ That such is the character and description of
 “ the custody which is held sufficient to render a
 “ document admissible, appears from all the cases.
 “ On the one hand, old grants to abbeys have been
 “ rejected as evidence of private rights, where the
 “ possession of them has appeared altogether un-
 “ connected with the persons who had an interest
 “ in the estate. Thus a manuscript found in the
 “ Herald’s office, enumerating the possessions of
 “ the dissolved Monastery of Tutbury, (*Lygon v.*
 “ *Strutt*, 2 Anstr. 601.) ; a manuscript found in the
 “ Bodleian Library, at Oxford, (*Michel v. Rabbets*,
 “ &c. in 3 Taunt. 91.) ; an old grant to a priory
 “ brought from the Cottonian MSS in the British
 “ Museum, (*Swinnerton v. Marquess of Stafford*,
 “ 3 Taunt. 91.), were held to be inadmissible, the
 “ possession of the documents being unconnec-
 “ ted with the interest in the property. On the
 “ other hand, an old Chartulary of the dissolved

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“ Abbey of Glastonbury, was held to be admissible,
 “ because found in the possession of the owner
 “ of part of the abbey lands, though not of the
 “ principal proprietor. This was not the proper
 “ custody, which, as Lord Redesdale observed,
 “ would have been the Augmentation Office,
 “ (4 Dow. 321) and as between the different pro-
 “ prietors of the abbey lands it might have been
 “ more reasonably expected to have been deposited
 “ with the largest ; but it was as the Court argued,
 “ a place of custody where it might be reasonably
 “ expected to be found, (*Bullen v. Michell*, 2 Price
 “ Rep. 413). So also in the case of *Jones v. Wal-*
 “ *ler*, 2 Gwill. 346, the collector’s book would have
 “ been as well authenticated if produced from the
 “ custody of the executors of the incumbent or
 “ his successor, as from the hands of the successor
 “ of the collector. (See also to the same effect the
 “ case of *Bertie v. Beaumont*, 2 Price, 307).

“ Upon this principle we think the case stated
 “ for the opinion of counsel, purporting to be
 “ stated on the part of Bishop Dopping and found
 “ in the place, and in the custody, before described,
 “ was admissible in evidence. It was a document
 “ which related to the private interest of the
 “ bishop at the time when it was stated, for it
 “ bears date in 1695 ; about which time it appears,
 “ from other facts found, that Barry, the late in-
 “ cumbent, was dead, and that before 1697 Bishop
 “ Dopping had collated his own son ; it related,
 “ therefore, to a real transaction which took place
 “ at the time. And although it might be said to
 “ have related, in some degree, to the see, for the
 “ right of collation was claimed as of an advowson
 “ granted to the see, yet it is manifest this case

“ had been stated, with reference to the private
 “ interests of the bishop, in the particular avoid-
 “ ance, and that it was more reasonable to expect
 “ it to be preserved with his private papers and
 “ family documents than in the public registry of
 “ the diocese. But even considered as a document
 “ belonging to the see, it was not unreasonable that
 “ it should have been found in the bishop’s man-
 “ sion house; for, upon the evidence, there is only
 “ one single ecclesiastical record preserved in the
 “ registry of the diocese of Meath, of an earlier
 “ date than 1717; and, on the other hand, the
 “ case and grant are found in the same parcel with
 “ several papers relating to the see of Meath, and
 “ in the same room were several visitation books
 “ of the diocese, and other papers, relating to the
 “ same see. It is objected in argument, that it
 “ does not appear, by legal evidence, what these
 “ papers were; but it seems a sufficient answer to
 “ that objection, that the papers themselves were
 “ not called for at the trial, which they might have
 “ been, neither is their non-production made the
 “ ground of any exception to the Judge’s direction
 “ at the trial. The case stated for counsel, there-
 “ fore, so found, and the reasonableness of its
 “ custody being corroborated by so many con-
 “ comitant circumstances, we think it was properly
 “ admitted in evidence.

“ But it is objected, secondly, that though it
 “ might have been admissible against the bishop,
 “ for whom it was stated, it cannot be so against
 “ his successor, because the facts, stated in the
 “ case, took place long before the bishop had any
 “ interest, and before he can be supposed to have
 “ had any knowledge of the see. The case, indeed,

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“ is dated in 1695 ; the grant which is set out in
 “ it is dated in 1635 ; the presentation under the
 “ grant in 1642 ; and the induction in 1660. Un-
 “ doubtedly, if by knowledge is meant a personal
 “ knowledge of the facts, it must be held to have
 “ been wanting in the present case ; but the facts
 “ stated were all facts that are evidenced by writ-
 “ ten documents ; the grant itself accompanied the
 “ case, being bound up in the same parcel ; the
 “ presentation and induction are only to be proved
 “ by written entries, which were peculiarly within
 “ the bishop’s reach, with such, the best means of
 “ knowledge ; therefore we think the statement by
 “ him, or by his attorney, of a fact in the case,
 “ directly against his own interest, at the time
 “ when the case was stated, was not only an ad-
 “ mission against him but against his successors,
 “ who stood in the same situation.

“ So much having been said about the case, it
 “ is scarcely necessary to refer to the grant ; it is
 “ set forth in the case, and thereby authenticated,
 “ and this alone would make it producible ; but it
 “ is in itself a grant of great antiquity, and we are
 “ bound to assume, without any apparent infirmity
 “ or defect on the face of it, to render it unworthy
 “ of credit. Upon the whole, therefore, our opi-
 “ nion is, that both the one document and the other
 “ were admissible.”

Your Lordships next direct the attention of the Judges to an act of parliament, passed at a parliament held at Drogheda, in the tenth year of King Henry VII. (set out in the appendix to the bill of exceptions, to which we are referred), and to a certain grant of the advowson of C., by King Edward IV., whereof he was seised in the same

right as of the advowson of Rathweir, in the said appendix mentioned; which grant was made to the Bishop of A., and is assumed to be in the same terms as that which is contained in the said appendix, and upon these latter documents your Lordships propose the two questions. (See p. 458.)

And upon these questions we are of opinion that the statute of Henry VII. did avoid the said grant of Edward IV., and that it did also reappend the advowson to the said manor. Several objections have been urged against holding the grant to fall within the operations of the statute; first, it is said, that the statute revokes no grants made by any kings, except those who were the progenitors of Henry VII., in the strict sense of the word, and that Edward IV. was not a progenitor of that king; secondly, that the statute does not extend to grants of which such progenitors were seised *jure privato* only, and that Edward IV. was seised *jure privato* of the advowson in question; thirdly, that it does not extend to revoke grants to corporations, whether sole or aggregate; and lastly, that it does not extend to any grants but those under the great seal, either of England or Ireland, and that the grant of the advowson in question is made under neither. Upon these several objections we shall observe in their order.

As to the first objection of the term progenitors, is it to be understood in its literal sense? then the only king of England who, since the last year of Edward II., was a progenitor of Henry VII. would be Edward III., for Henry VI. was no progenitor, in the strict sense of the word, but as he is expressly named in the preamble to the statute

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19 Hen. VII. c. 18.: he was the uncle of the king. As, however, the term used in the act is the plural term progenitors, more than one king must have been intended, and it seems not possible to extend it beyond one, without allowing it to be synonymous with "predecessors;" a word with which it is often put in apposition in statutes of the same reign. (See 11 Hen. VII. c. 18.) And again, the statute referred to by the counsel for the Plaintiff in error, as set out in *Plowden*, Rep. 226.; wherein Henry IV., Henry V., and Henry VI. are called the king's noble progenitors, affords itself a proof that the word is used in a wider sense, for those kings were his predecessors, but not his progenitors. Again, the word must either comprise all his predecessors and kings of England, or his predecessors who were of the house of Lancaster only; but it would lead to an unreasonable result if the word is confined to the latter only, for, in that case, all the grants made by the house of Lancaster to their friends would be annulled, and those made by the house of York to the enemies of the house of Lancaster would be confirmed; and when the object of the statute is considered, which was that of bringing money into the king's coffers by the annulling all former improvident grants of the crown, there can be no reason to doubt that it was intended to comprise within it the grants made by former kings of England, whether of the one house or the other.

As to the objection secondly above urged, that the statute extends to grants only of such property whereof the crown was seised *jure coronæ*,—no such distinction appears upon the face of the statute itself. The king (Edward IV.) was equally

seised in fee, whether the advowson belonged to him *jure privato* or *jure coronæ*. "Advowsons of churches" are within the express words of the statute; independently of which the sale of the next presentations, or the sale of the advowsons themselves, made them the possible source of profit to the crown, and whether the advowson in question, supposing there had been no grant by Edward IV., would have devolved upon Henry VII. as parcel of the possessions of the crown, or whether he would have taken it in right of his wife, by descent to her and his marriage; in either case the advowson would have been valuable to him, though perhaps to a different extent upon the two suppositions.

It seems, therefore, to become unnecessary to determine whether, on the facts stated in the bill of exceptions, this advowson was the property of Edward IV. in right of his crown or not: but it appears to follow, from the decision of the case in the duchy of Lancaster, in *Plowden*, and by what is said by Holt C. J. in the Banker's case*, that whatever belonged to Edward IV. before he came to the throne, on his accession to the crown belonged to him in *jure coronæ*, in his politic capacity and not in his private; and, as such, it would descend to Edward V., be transferred to Rich. III. on his accession to the crown, and, in like manner, devolve upon Henry VII. In this respect, therefore, the earldom of March, and all the lands and tenements belonging to it, would be precisely on the same footing as the duchy of Lancaster would have been, but for the charter of Henry IV., confirmed by parliament; which, according to the

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doctrine laid down by the Judges, would have been otherwise annexed to the crown.*

As to the third objection, that the statute extends only to the case of grants to private persons, and does not include those to corporations, either sole or aggregate, we think it sufficient to observe, that the words are large enough to extend to both; the very expression of "any person or persons by whatever name or names they may be named," pointing as well, or rather more expressly, to a body politic, which is known only by name, than to persons in their individual capacity, and, if this were left in doubt, the exception annexed to the act of the grant to the archbishop of Dublin and to the corporation of the bailiffs of Dundalk, shows that, if not specially excepted, bodies corporate, both sole and aggregate, were understood to be included in the operation of the act. The only remaining objection is that which limits the operation of the statute to grants under the great seal of England or Ireland. Upon this head of inquiry the Plaintiffs in error object that the grant in question does not appear to have been made under the great seal, either of the one or the other kingdom. The argument appears to stand thus: that from the facts, stated in the bill of exceptions, Edward IV. must be taken to have been seised of this property as Earl of March; that by this title, deduced in the inquisition, 23 Henry VIII., it appears that the March property was always kept by Edward IV. distinct from property held *jure coronæ*; a course of descent being in that inquisition traced from him to Henry VIII. quite inconsistent with that of Crown land. It is inferred, therefore, *a priori*,

* Plowd. Rep. 214.

that Edward IV., granting in the right of his earldom of March, would grant under some seal belonging to him as such; at all events, neither by the great seal nor by acts of parliament: that nothing appears on the face of the grant to contradict this presumption, the letters not being stated to be patent, nor any seal now appearing, nor any circumstance from which it can be argued that the grant was originally under the great seal in either country. It is further alleged, that by 4 Henry VII. c. 14. (English act) it is expressly recited, that in Edward IVth's time all grants of property, parcel of the earldom of March, were made under a special seal, called "Seal of the " Marches," and that for redress of mischiefs ensuing thereupon, it is, by that statute, enacted, that, for the future, all such grants shall be made under the great seal. Now, looking at and examining the grant in question, it appears, upon the face of it, to relate to a subject matter which the king held as lord of Ireland and granted as such. No allusion is made to any individual, or particular character, but the king grants with the assent substantially of the lord lieutenant, who, as such, would have nothing to do but with the property of the king held *jure coronæ*; further, the grant is made with a *non obstante* of any statute, act, or ordinance to the contrary: a clause which the king granting merely as Earl of March never would assume to have power to add: the *teste* also is from the year of the reign, a circumstance which would rather indicate the grant to have been made by the king *jure coronæ* than the contrary. This inference, arising upon the face of the grant itself, is confirmed by the acknowledged principle of law, that upon the access of Edward IV. to the Crown,

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his possessions, as Earl of March, would become annexed, in point of government and administration at least, to the possessions of the Crown. The authority of the Judges in the case of the *Duchy of Lancaster**, is precisely to the point. Speaking of the mode of passing land, held by the king *jure coronæ*, by letters patent only, without livery of seisin, they add, "So it has been the practice, with regard to the lands which descended to the king from the Duke of York, the Earl of March, and others of the king's ancestors, who never were kings." †

The land, therefore, of the earldom would properly be passable by such form of grant only, as would be used by the king in conveying property held *jure coronæ*. This is a well known consequence resulting not from the title of the property, but the dignity of the holder in whom the body politic absorbs the body natural.

Whether, therefore, the property of the Earl of March were annexed to the crown at the date of the grant in question or not, seems not very material, for being at all events in the hands of the king for the time being, the legal presumption is that it would for that time be granted as if it were held *jure coronæ*. The argument, therefore, deduced from the title and course of descent, traced by the inquiry relating to the manor of Rathweir, with its appurtenants, fails in its application, even if we could attach much weight upon a question of fact, to a document which is manifestly inaccurate upon the bare inspection of it, omitting as it does all mention of the two sons of Edw. IV., from the eldest of whom Henry V., and not from the father, the daughters must have inherited.

* Plowd. 213.

† See also Mo. Rep. 9.

But the difficulty still remains as to the recital in the English statute 4 Hen. 7. c. 14. If this had been an inquiry as to property in England, that recital would undoubtedly have presented a difficulty almost insurmountable, for a fact is stated therein, and a mischief resulting from it, for the redress of which the statute is made. Whatever legal presumptions there may be to the contrary, the recital affords strong evidence that the irregular practice complained of in the statute had actually taken place.

The weight however of this evidence, and even its applicability to the subject under discussion, is answered by the consideration, that we are now dealing with property in Ireland. The remedy was certainly intended to apply, and at the time was applicable only to England and Wales, for Poyning's law had not then passed: There is no ground for presuming that the English legislature took notice of any matter passing in Ireland; and the seal spoken of in the statute, "The Seal of the Marches," seems in terms rather to apply to the border; property in England and Wales, than to patrimonial domains in Ireland; and there is, *de facto*, an improbability that grants in Ireland should have passed under a seal used for and permanently kept in England or Wales. It is further to be observed, that the bill of exceptions expressly states the document in question to be letters patent of Edw. IV.; a description which *primâ facie* would imply that it was under the great seal, and still further, that the description is in the very same terms with that given of the letters patent of Edw. III., by which he granted the manor and advowson to John Darcy and Johanna, his wife, in tail male; which letters

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patent must have been under the great seal, as the property was then vested in the crown *jure coronæ*, under the escheat from Roger Mortimer, Earl of March; if therefore the letters patent are under the great seal in one case, why are we to intend otherwise in the second instance which is now under discussion?

Upon examination, therefore, of this question by the light afforded by the bill of exceptions, and by such legal presumptions as the facts therein stated afford; we think this grant of Edw. IV. did fall within the operation of the statute of Hen. VII., and that it was avoided by that statute.

Upon the question next proposed to us, whether by the effect of such resumption of the grant, the advowson became reappended to the manor, which still remained in the hands of the crown, we think the words of the statute itself give the answer, without entering into the discussion of the various authorities which have been cited in the argument before your Lordships. Nothing but the grant of Edw. IV. had disappended the advowson from the manor; the resumption act “annuls, makes void” and of none effect in the law,” the grant itself. This is not the case of a parliamentary reconveyance, but the cause of disappendancy ceases from the time of passing the act as if it had never been, and with it all effect of the grant from that time must necessarily also cease. It was urged at your Lordships’ bar, that the consequences would be monstrous if the grant were to be held altogether void; that it would avoid and render illegal all intermediate acts founded on a grant legal in itself when made; but we are far from thinking the consequences above stated would follow; a grant which is to be deemed void in law, and as if it had never

been from a certain day, may yet be regarded as having had existence at a former period, for the purpose only of preventing parties who have dealt with the property from being treated as trespassers or wrong-doers, and protecting acts done at an intermediate time. For the reasons therefore above given, we think the advowson became re-appended to the manor by the legal operation of the statute above referred to.

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Your Lordships lastly refer to the pleadings upon the fifth count, putting the case of a *quare impedit* brought by C. against the Bishop of A.; and to the issue joined in those pleas; and after premising that on these issues a fine is tendered in evidence levied by B., whose estate C. hath, which fine is set forth in the pleadings to which we are referred, your Lordships propose three questions. (See p. 458.)

The fine in question is stated to have been levied in Trinity term, 1 Jac. 2. by William, seventh earl of Clanricard, and Hester his wife, to John Brown, Gerald Dillon, and Anthony Mulledy, and the heirs of the said John Brown, of the manors of Rathweir and Killucan, with the appurtenances, and divers quantities of land therein specified; and also of the advowson and right of patronage of the parish of Killucan. In answer to the first of the questions proposed by your Lordships, we are of opinion, that the fine upon the state of the pleadings on the record, was not admissible in evidence under any of the issues joined therein. There are only three issues upon which there can be any ground whatever to contend that the fine was admissible; the issue taken upon the traverse by the bishop in his twelfth plea (which is precisely the same in terms as the issue taken by the clerk in his eighth plea),

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and the issue taken upon the traverse by the clerk in his fifth and seventh pleas; all the remaining issues being raised on single points quite unconnected with and altogether unaffected by the fine.

The traverse of the bishop is in these terms: "Without this, that the Plaintiff below is possessed of the said advowson of the said church of Killucan, otherwise Rathweir, in manner and form as the said Plaintiff hath in his said fifth count alleged." That this traverse would have been held bad upon a special demurrer there can be no doubt; but it is contended that as the Plaintiff has, instead of demurring, taken issue upon this traverse, he has waived any objection to it, and must be contented to admit under it, all such evidence as by law it is calculated to receive. We must consider the point, therefore, as though this had been the only issue upon the record; and whether it would have been competent in that case to the Defendant to give in evidence the fine by William, the seventh Earl, and Hester his wife, is the question before us. No authority can be found in the books which will throw any light upon the question, for no instance can be brought forward where any parties in a *quare impedit* have proceeded to trial on such an issue. If the precedents given in *Mallory* on *Quare Impedit*, and the more numerous precedents to which he has referred from the best books of entries, are consulted, it will be found that, with scarcely an exception, all of them contain at the conclusion of the count the allegation which is found in this, viz. "Whereby the Plaintiff became "possessed of the advowson," or "of the right to "present," and yet in no single instance is there any traverse of that allegation. What evidence

therefore may or may not be admitted under that traverse, must depend upon principle and analogy to other cases, and cannot be governed by any direct authority. The first inquiry is, to what allegation does the traverse relate?

The Plaintiff having in his fifth count distinctly alleged the death of Mr. Windham, who had been shown to be joint tenant with the Plaintiff of a certain term of years in this advowson, proceeds to allege — “Whereupon and whereby the Plaintiff “became and still is possessed of the said advowson, as of an advowson in gross, for the remainder “of the said term so theretofore granted.” This is the allegation, and the only allegation in this count to which the traverse can possibly apply; and as the traverse is taken upon the precise terms of this allegation, one ground upon which the fine may be held to be inadmissible is, that the traverse is confined to the possession of the Plaintiff by reason of the term for years, and of his surviving his co-joint-tenant in the term, such being the fair and natural import of the allegation made by the Plaintiff. It is unnecessary to say, that if such be the proper construction of the traverse, the fine is altogether inadmissible.

But admitting for the purpose of the argument, that the declaration takes a wider range, and that it amounts to an allegation, that by reason of all the various steps in the title of the Plaintiff, which are set out in the fifth count of the declaration, the Plaintiff is possessed of the right to the advowson, and admitting the traverse to be equally extensive and to put all those steps of the title in issue, still we think by analogy to the rules of pleading, the utmost effect that can be given to such a traverse

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is that it is a simple denial of the different allegations of the descent, and of the other steps of the title, so as thereby to put the Plaintiff to the proof of his whole declaration; but that the traverse will not admit of new and affirmative evidence on the part of the Defendant, taking the title out of the Plaintiff and vesting it in another person. The general principle of pleading is that the Defendant must either deny, or he must confess and avoid the charge in the declaration; the same plea cannot do both; but supposing this traverse to have the effect of a general denial of each link in the chain of title, if besides compelling the Plaintiff to prove them, and bringing his own witnesses to contest the truth of its existence, he might prove affirmatively a title in another person, what is that in effect but giving to this anomalous and unheard of traverse the double force of a denial of all the steps of the title, and at the same time, a confession of the existence of the title, but an avoidance of its effect?

In the present case, there is only one allegation in the count to which the fine could by possibility apply, and that is the allegation which, after stating William, the seventh Earl, to have been seised in fee tail of the advowson in gross, by virtue of letters patent and of an act of parliament, and that he continued so seised, avers that, "upon his death the "advowson descended upon Richard, the eighth "Earl, as his son and heir in tail male;" and we hold that admitting the traverse to amount to a denial of the steps by which Earl William's title in fee tail is deduced, it will not allow the Defendant to prove by the fine that such title ceased before his death; for if the title in fee or fee tail is once admitted or

proved in any person, it must be intended to continue in that person, without any allegation that it does, until the contrary is shown. (1 Lutw. 357. Plowd. 431); and the cesser of that estate by conveyance or otherwise, is affirmative matter which ought to be shown by a special plea on the other side.

We therefore think ourselves well warranted in the conclusion that the fine was not admissible under the issue above considered.

With respect to the traverse taken by the clerk in his seventh plea, it is in these terms, "that it doth not belong to the Plaintiff to present a fit person to the church in manner and form, &c." This is no more than a precise denial taken by the Defendant of the last words in the Plaintiff's declaration, viz. "and for that reason it now belongs to the said Plaintiff to present a fit person to the said last mentioned church." It is a mere inference of law resulting from all the facts stated in the count, and altogether unlike the traverse in the case of the *Grocers' Company v. The Archbishop of Canterbury**, which included a matter of fact material to the right.

But taking it to be a traverse of all the steps by which the title to the advowson is deduced to the Plaintiff from Richard the fourth earl, who is averred to have been first seised in fee; the same objection applies to the admissibility of the fine in evidence, under this traverse, as under that to the bishop's twelfth plea; and the same observation may also be made with respect to the issue on the fifth plea, as to the seisin of Michael, the tenth Earl; and, besides, there is another reason why, under

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* 3 Wilson, 214.

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the traverses in the fifth, seventh, and eighth of the clerk's pleas, the evidence of the fine should not be admitted, though the same reason does not exist as to the traverse in the twelfth plea of the bishop, in which he claims to present as patron. It is clearly established, that neither the clerk nor ordinary, in that character, could counterplead the Plaintiff's title at common law, for neither of them had any interest in this patronage, and under the statute 25 Edward III. s. 3. c. 7. the incumbent (as possessor when presented and instituted) could not counterplead the Plaintiff's title, without maintaining his own title, and that of his patron on which his own depends. This is distinctly laid down by Lord Hobart in the case of *Elvis v. Archbishop of Canterbury**, for the statute only allows the pursuer "to have his answer, and shew "and defend his right upon the matter." The plea, therefore, which sets out the title of the patron, ought, in order to maintain it, to traverse the Plaintiff's title so far as it is inconsistent with that of his own patron, and so far only; and, in that sense, the traverse in the fifth, seventh and eighth pleas must be understood, if the pleas are good in substance; that is, it must be taken that the clerk means not to set up the title of a stranger to both the litigant parties, which would cut down the title both of himself and of his patron, which the law does not permit him to do, but to affirm that the title to the advowson was in the Bishop of Meath, or some one under whom they claim, and not in Earl Michael or the Plaintiff, at the times respectively mentioned in the fifth count, and referred to in the traverses contained in the fifth, seventh and

* Hob. 11. 315.

eighth pleas of the clerk. In this mode of construing the traverses it is clear that the fine which showed the title to be in third persons was not admissible in evidence under any of the issues joined on this record.

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With respect to the second question, lastly above proposed to us, viz. whether, if the fine were received in evidence, it ought to be left to the jury to say whether it barred the action of *quare impedit*, we all think that the legal effect of such fine, as a bar to the action of *quare impedit*, is a matter of law merely, and not in any way a matter of fact, and, consequently, the Judge who tried the cause should state to the jury whether, in point of law, the fine had that effect, or what other effect on the rights of the litigant parties, upon the general and acknowledged principle “ad “questionem juris non respondent juratores.” In answer to the last question proposed to us, we all agree in opinion, that the fine did not, if properly received in evidence, absolutely of itself bar the action of *quare impedit*. It could not do so on the ground of estoppel, because the parties to this suit did not both claim respectively under the parties to the fine, and the fine is an estoppel only between parties and privies; and though it operates as a conveyance from Earl William, the seventh earl, to Brown, Dillon, and Mulledy for a valuable consideration, it was possible that this was a conveyance by way of mortgage which had been paid off, or that these parties might have reconveyed the advowson to Earl William or some subsequent earl; and there is even some evidence stated in the bill of exceptions to raise a presumption that it was so, for in 1699 Earl Richard conveyed to John Morgan,

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and in 1744 John Morgan reconveyed the advowson to Earl John Smith, and there was no evidence of any dealing with the advowson or presentation by the conusees of the fine, or any one claiming under them. It cannot, therefore, be said that the fine alone, if it had been admissible, was an absolute bar to the action, which is the last question proposed by your Lordships.

On the 1st Aug. 1836, the judgment was affirmed, without any material observation.

Judgment affirmed, with costs.

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IRELAND.

(COURT OF CHANCERY.)

Sir GERARD NOEL NOEL, Baronet - *Appellant*;GUSTAVUS ROCHFORD and Others - *Respondents*.

In 1801, R. a partner in a banking concern in Ireland, applied to N. and Co. a banking-house in London, for a loan of 10,000*l.* to bring into the Irish firm as his share of the capital; which sum they advanced upon the security of four bonds for 2500*l.* each, with warrants of attorney to confess judgments; which were accordingly entered up in the Court of King's Bench in Ireland, in the year 1803. The bonds were expressed to be for the sum "of 5000*l. sterling*," and the condition was for the payment of the sum of "2500*l. sterling* of "good and lawful money of Great Britain, with legal interest." The warrants of attorney recited the bonds in the same words. The judgments had only, the expression "5000*l. sterling*." Upon the execution of the bonds credit was given to R. in the books of N. and Co. for the sum of 10,000*l.*, of which R. being advised, he by letter dated in August, 1801, authorized N. and Co. to answer bills to the amount of 10,000*l.*, which were afterwards drawn by the Irish firm, and accepted and paid by N. and Co. Payments on account of the debt were made at various times to B. a legal agent of N. and Co. at Dublin, and he accepted and accounted for those payments as made in Irish currency. Upon a bill filed by the assignee of the debt, held, that it was payable in English currency and with English interest.

THE Appellant, together with George Templer, Nathaniel Middleton, and Richard Johnson, all since deceased, and John Wedgwood, being engaged in the banking business in the city of London, in

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and before the year 1800, and Sir John Hadley Doyley, *baronet*, John Sperling, and Edmund Grange, being engaged in the business of brewers and distillers in copartnership in the city of Dublin, under the style of Edmund Grange and Company, the Appellant's house of Messrs. Noel and Company had various dealings with them, as bankers and agents, to a very considerable extent.*

In the year 1801, Gustavus Rochfort, (the father of the Respondent,) a gentleman of large landed estate, entered into an agreement with the firm of Edmund Grange and Company, to become a partner therein, and to advance the sum of 10,000*l.* as his share of the capital; but not being prepared to make an immediate payment thereof, he applied to the Appellant's firm of Noel and Company, and requested them to lend and advance that sum to him, and the Appellant's firm thereupon agreed to lend the sum of 10,000*l.* to Gustavus Rochfort upon the security next hereinafter mentioned.

Gustavus Rochfort accordingly executed to Richard Johnson, in trust, for himself and his co-partners, four several bonds, dated respectively the 3d of August, 1801, with warrants of attorney for confessing judgment thereon, in order to secure the payment of the loan of 10,000*l.*, by four instalments of 2,500*l.* each, payable on the 29th of September, 1802, the 25th of March, 1803, the 29th of September following, and the 25th of March, 1804; and Richard Johnson caused four several judgments to be duly entered up on the said bonds

* The history of the transactions between these firms, and other questions arising between the Appellant and Respondents, are reported *anti*, Vol. V. p. 667.

in the Court of King's Bench in Ireland, as of Trinity term, 1803.

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The bonds, warrants of attorney, and judgments are in the following form : —

“ Know all men by these presents, that I, Gustavus Rochfort, of Rochfort, in the county of Westmeath, esquire, am held and firmly bound unto Richard Johnson, of Stratford Place, in the city of London, in the sum of 5,000*l.* sterling, good and lawful money of Great Britain, to be paid to the said Richard Johnson, or his lawful attorney, executors, administrators, or assigns; to the which payment well and truly to be made I do bind me and my heirs, executors, and administrators, and every of them firmly by these presents, sealed with my seal, and dated the 3d day of August, in the year of our Lord 1801.

“ The condition of the above obligation is such, that if the above-bound Gustavus Rochfort, his heirs, executors, administrators, or assigns, do well and truly pay or cause to be paid unto the above-named Richard Johnson, his executors, administrators, or assigns, the just and full sum of 2,500*l.* sterling, of good and lawful money of Great Britain, on the 29th day of September, 1802, with legal interest, without fraud or further delay, that then the above obligation to be void and of none effect, or else to stand and remain in full force and virtue in law.

“ (Signed) GUSTAVUS ROCHFORD.

“ Signed, sealed and delivered in the presence of W. G.”

“ To William Baillie, gentleman, attorney of his Majesty's Court of Exchequer in Ireland, or any of them, or to any other attorney of the same

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“ Court, or to any attorney of any other his Majesty’s Courts of Record in Ireland aforesaid, Great Britain, or elsewhere.

“ These are to desire, authorize, and appoint you, or any of you, to appear for me, Gustavus Rochfort, in the county of Westmeath, esquire, at the suit of Richard Johnson, of Stratford Place, in the city of London, esquire, his executors or administrators, and confess a judgment as of last Trinity term, or of any term or time whatsoever, after the day of the date hereof, with stay of execution until the 29th day of September, 1802, in the said Court of Exchequer, or any other his Majesty’s Courts of Record in Ireland, Great Britain, or elsewhere, by acknowledging the action or otherwise, upon a declaration there to be filed against me, upon a bond of 5,000*l. sterling*, *good and lawful money of Great Britain*, bearing equal date with these presents, conditioned for the payment of 2,500*l.*, with legal interest, of like lawful money of Great Britain, upon the said 29th day of September, 1802 ; and for your or any of your so doing, this shall be your sufficient warrant and discharge.”

“ And know all men by these presents that I, the said Gustavus Rochfort, do hereby, for me and my heirs, executors, and administrators, authorize you or any of you to remise, release, and for ever quit claim unto the said Richard Johnson, esq., his executors, administrators, and assigns, all and all manner of error or errors, or misprision of error or errors, or erroneous proceedings whatsoever, that are or may be in the said judgment or the proceedings thereupon.

“ Witness my hand and seal the 3d day of August,
 “ in the year of Lord God, 1801.

“(Signed) GUST. ROCHFORD. (L.S.)”

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“ Pleas, &c. of Trinity term, in the 41st year of
 “ the reign of Geo. III., &c. (Witness) ARTHUR
 “ VISCOUNT KILWARDEN,” &c.

“ County of the city of Dublin (to wit). — Be it
 “ remembered, &c. Richard Johnson, &c. com-
 “ plains of Gustavus Rochfort, &c. of a plea that
 “ he render to him the sum of 5,000*l. sterling*,
 “ which he owes him and unjustly detains; for that
 “ whereas on the 3rd day of August, 1801, at
 “ Castle Street, in the said city, by his certain
 “ writing obligatory, sealed with his seal, and to
 “ this Court now here produced, the date whereof
 “ is the day and year aforesaid, acknowledged
 “ himself to be held and firmly bound to him, the
 “ said Richard, in the said sum of 5,000*l. sterling*,
 “ &c. It is, therefore, considered that the said
 “ Richard do recover against the said Gustavus,
 “ his said debt,” &c.

Upon the execution of the bonds, the sum of 10,000*l.* was immediately carried to the credit of Gustavus Rochfort, in Noel and Company's books of account, and he had liberty to draw for the same as he should think proper, and was by letter duly advised thereof by Noel and Company; and Gustavus Rochfort shortly afterwards wrote, and sent a letter, dated the 22d of August, 1801, acknowledging such letter of Messrs. Noel and Company, accompanied by an authority, whereby he authorized and requested them to answer the bills of Edmund Grange and Company to the extent of the money for which they had agreed to give him

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credit, and to debit his account for those sums up to the extent of 10,000*l*.

Shortly after the receipt of this authority, Edmund Grange and Company drew upon Noel and Company five several bills of exchange, amounting altogether to the sum of 10,000*l*. British, which were all duly accepted and paid in pursuance of the authority before referred to, and upon the security of the four bonds hereinbefore stated.

The house of Noel and Company continued to transact business as bankers and agents of the firm of Grange and Company, until January, 1804, when Grange and Company became greatly embarrassed in their circumstances, and were indebted to the Appellant's house, in respect of monies advanced by them to and for the use of the firm of Grange and Company, in a sum of upwards of 120,000*l*., exclusive of the before-mentioned sum of 10,000*l*. And it was thereupon represented to Noel and Company, that it would be for their benefit to accept a composition for their debts due from the house of Grange and Company, rather than drive them to a bankruptcy.

The Appellant and his co-partners, acting under the representations made to them, agreed to accept a sum of 42,000*l*. as a composition for the debt so due to them from the firm of Grange and Company, to be secured in the following manner: 10,000*l*., part thereof, by a mortgage on certain estates, the separate property of Gustavus Rochfort; the further sum of 10,000*l*., other part thereof, by a mortgage on certain estates, the separate property of John Sperling; 15,000*l*., further part thereof, by a mortgage on the partnership premises, wherein the business was carried on; and 7,000*l*., residue

of the said 42,000*l.*, by a rent-charge of 1000*l.* per annum, for the term of seven years ; and accordingly Gustavus Rochfort executed certain indentures of lease and release, by way of mortgage, bearing date respectively the 25th and 26th days of May, 1804, for carrying such arrangement on his part into effect. Gustavus Rochfort, also in pursuance of an agreement in the said mortgage deed contained, executed a bond conditioned for the payment of 10,000*l.*, bearing even date with the last-mentioned indenture, as a further security for the payment of the said 10,000*l.*, secured by the mortgage, on which bond judgment was entered up in the Court of Common Pleas in Ireland, as of Easter Term, 1823, and with a view to the further performance of the agreement for a composition ; and in consideration of such composition a certain indenture of release, bearing date the 25th of May, 1804, was executed by Noel and Company to Grange and Company.

A question was raised, whether such release was intended to extend beyond a release from the house of Noel and Company to Grange and Company, for the partnership debt, so as to make void any securities passed by the several individual partners in the house of Grange and Company to the house of Noel and Company, and in particular to extend to or affect the four bonds executed by Gustavus Rochfort for his individual debt, and then held by Noel and Company. This question was disposed of in favour of the Appellant.

The mortgage and mortgaged premises and the bond and warrant of attorney, and also the four bonds and judgment, after several mesne assignments, became ultimately vested in the Appellant.

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On the 1st of July, 1824, the Appellant filed his bill in the Court of Chancery in Ireland, in the nature of an original and supplemental bill, stating, among other matters, the facts and proceedings upon a bill of foreclosure and questions, raised in the Courts below, and on former appeals; and also stating the death of Gustavus Rochfort the elder, and that he had, by his last will and testament, charged his estates in Ireland with payment of his debts; and it prayed, amongst other things, an account of the real and personal estate of Gustavus Rochfort, deceased, and of his debts, funeral expenses, and legacies; and that all persons having incumbrances might come in and prove the same; that the priority of the said debts might be ascertained; and that an account might be taken of the said judgments, and the interest and costs, and that the Appellant might be paid the same; and that if the personal estate of the said Gustavus Rochfort should be insufficient to discharge the same, then that his real estates, or a competent part thereof, should be sold, and that the Appellant and the other creditors might be paid according to their priorities.

The Defendants having put in their answers to the bill, replications were filed, and the cause being at issue, witnesses were examined on the part of the Appellant, who were cross-examined on the part of the Respondent.

Robert Burrowes proved that, acting as agent for the banking house of the Appellant, he, subsequently to the date of the release and mortgage, pressed Gustavus Rochfort for payments on account of the four bonds; and that Gustavus Rochfort, after craving indulgence from time to time, examined all the accounts with the deponent, in the

presence of William Baillie, Gustavus Rochfort's solicitor; and that the said Gustavus Rochfort did not dispute the debt in respect of the four bonds, but that, to the best of his belief, he (Rochfort) made an objection that the advance of 10,000*l.* should not be considered as English, but as Irish currency; and that he also made an objection as to the period from which interest should be charged upon his bonds.

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On the 28th of June, 1828, the cause came on to be heard before the Lord Chancellor of Ireland (Sir Anthony Hart), when his Lordship directed certain issues to be tried. Against that order the Appellant appealed to the House of Lords. Upon the hearing of that appeal, the issues were amended in certain respects, and the House affirmed the order in other respects.* The issues as amended were tried on the 22d, 23d, 24th, and 25th of November, 1831, and a verdict found for the Defendant in the action (the Appellant) upon both the issues, thereby establishing the fact that the sums secured by the bonds had not been paid, or the debts thereby created released, or otherwise satisfied.

The cause came on for further hearing, upon the Judge's certificate, on the 31st of December, 1831, when it was decreed that the will of the testator (Gustavus Rochfort) was well proved; and it was, amongst other things, referred to the Master to take an account of the sums due to the Appellant on the foot of the said four judgments, for principal, interest, and costs; and the Master was thereby directed to take an account of the testator's real and personal estate, and of his debts and funeral and testamentary expenses.

* *Ante*, Vol. 5.

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Witnesses were examined upon interrogatories, before the Master, on behalf of the Appellant; and William Dallas, to the second interrogatory said, that he was in the employment of Noel and Company, in the year 1802, as book-keeper and accountant; and that he was acquainted with the dealings of the house of Noel and Company, and Gustavus Rochfort, esquire, deceased; and that he had looked upon four paper writings, marked with the letters N, O, P, Q, respectively produced to him; and that such paper writings purported to be bonds from Gustavus Rochfort, in the county of Westmeath, esquire, to Richard Johnson, of London, esquire, each being for the consideration of 2500*l.* of Great Britain; and he said that, to the knowledge of this deponent, acquired in the capacity as clerk and accountant to the said firm of Noel and Company, and from an examination of the books of the said firm, the four several sums of 2500*l.* aforesaid, amounting in the whole to the sum of 10,000*l.*, secured by the said produced bonds, was and were advanced to the said Gustavus Rochfort, the obligor in the said bonds respectively, or for his use, or by his direction, by the said firm of Noel and Company; and he said that the said four several sums of 2500*l.* mentioned in the condition of the said produced bonds, and amounting in the whole to the said sum of 10,000*l.*, was and were so advanced to the said Gustavus Rochfort, or for his use as aforesaid, by the said Noel and Company, in British currency.

Robert Burrowes, to the said interrogatory deposed, that he was the law agent to the banking house of Noel and Company, in the year 1803, and that he continued to act in that capacity to the middle of the year 1806; and that the said bank-

ing house had a demand against the late Gustavus Rochfort for the amount of four several judgments of 2500*l.* each, obtained on four bonds; and he said he was employed by the said banking house to obtain payment of the said judgments in the year 1803, and that he received several sums of money on account of the said judgments from the said Gustavus Rochfort, or from persons acting on his behalf; and that the sum and sums so received by and paid to the said deponent were so received on account of the sums secured by the said four judgments; and that on or about the 3d of February, 1804, the said deponent received a sum of 1000*l.* on account of the said four judgments; and that the said sum was of the late Irish currency; and that he lodged the said sum of 1000*l.* in the banking house of Messrs. Beresford and Company, to the account and for the benefit of the said banking house of Noel and Company; and that he did not transmit the said sum of 1000*l.* to the said Messrs. Noel and Company, but lodged the same with the banking house of Beresford and Company, for account of the said Noel and Company; and that he received on account of the said four judgments, by different payments (including said 1000*l.*), a sum of 8890*l.*, of the late Irish currency; and he said that, to the best of his recollection, he did, on or about the 26th of September, 1804, receive a sum 4000*l.*, and on the 15th of December, in the said year, he received a further sum of 2500*l.*; and in the month of July, 1805, he received a further sum of 530*l.*; and he said that, as well as he recollected, one other payment was made to him on account of the said four judgments of 860*l.*, some time in the year 1804; and the deponent further

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said, that on or about the 27th of September, 1804, he remitted the said sum of 4000*l.* so received by him on account, on the 26th, by a bill drawn by Roe and Company on B. Trench and Company, for the sum of 3539*l.* 16*s.* 3*d.* British, enclosed, to Noel and Company, and which at the then course of exchange, being, as he believed, 13 per cent., was equal to the said sum of 4000*l.* Irish; and he further said, that on the 2d of December, 1804, he remitted to the said Noel and Company Bank of England notes to the amount of 2250*l.* British, which, at the then course of exchange, being, as he believed, 10 per cent. exchange, is equal to the sum of 2475*l.* of the late currency; and he said that in the month of August, 1803, he also remitted to Messrs. Noel and Company his draft or bill of exchange on B. Trench and Company for 500*l.* British, which, at the course of exchange, being, as the deponent believed, 12½ per cent., is equal to the sum of 562*l.* 10*s.* 6*d.* of the late Irish currency; and he said, that in or about the month of July, 1805, he received from the said Gustavus Rochfort, or some person for him, on account of the said four judgments, a sum of 530*l.* Irish currency, and did, in the month of August in the same year, remit a sum of 500*l.* British to the said firm of Noel and Company, and which at 12½ per cent., being, as the deponent believed, the rate of exchange when the same was so remitted, is equal to the sum of 562*l.* 10*s.* Irish.

The Master made his report, bearing date the 31st of May, 1833, and thereby (amongst other things) certified that the said Gustavus Rochfort, on the 3d of August, 1801, executed his four several bonds with warrants of attorney for confessing

judgment thereon to Richard Johnson, of Stratford Place, in the county of Middlesex, banker, in trust for himself and the other persons in the firm of Edwards, Templer, and Company, each in the sum of 5000*l.* sterling, lawful money of Great Britain, conditioned for the payment of 2500*l.* of like lawful money, and which bonds he certified were executed in Ireland; and he certified that the said Richard Johnson did, in or as of Trinity Term, 1801, obtain four several judgments on the said bonds, in his Majesty's Court of King's Bench, in Ireland, against the said Gustavus Rochfort, deceased, each in the penal sum of 5000*l.*; and the said Master thereby certified that the sum of 10,000*l.*, secured by the said four bonds, was advanced and paid by the said Richard Johnson, as one of the partners in the said banking house of Noel, Templer, and Company, to the said Gustavus Rochfort, or for his use, in British currency; and that there was due to the Appellant the sum of 8,441*l.* 13*s.* 6*d.*, being principal and interest at 5*l.* per cent.; but on the part of the Defendant (the Respondent, Gustavus Rochfort,) it was contended that the said bonds and warrants having been executed in Ireland, and the judgment thereon entered in the Court of King's Bench, in Ireland; and also, as it appeared from an account furnished by Robert Burrowes, esquire, as attorney for the said banking house, in the year 1804, proved in the said cause that the said Robert Burrowes, as such attorney and authorised agent of the Appellants, in that account treated the said sum so advanced as Irish currency, and charged interest at the rate of 6 per cent.; he should consider the sum secured as principal money Irish currency, and certify ac-

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cordingly; and that on the part of the Appellant it was contended that he should treat the sum so advanced as British currency, and payable with British interest at 5 per cent.; and after he had prepared the draft of his report, in which he treated the advance as British principal and British interest, the same counsel contended that he should report that the sum advanced being British principal on Irish security, should be liable to 6 per cent. interest; and also that he should report that the Appellant was entitled to the exchange on the payments made by the Defendant at the rate of the day; but the Defendant insisted that, under any circumstances, he was not liable to any exchange, but was entitled to make the payment without reference to any remittances to London; and that the Master therefore certified that he had taken the account in five different ways, making due to the Appellant,— firstly, as British principal, at 5 per cent. interest, exchange at par, 8441*l.* 13*s.* 6*d.*; secondly, as Irish principal, at Irish interest, 7835*l.* 10*s.* 11*d.*; thirdly, as British principal, at English interest, with exchange on the payments by Defendant at the rate of the day, 9197*l.* 16*s.* 2*d.*; fourthly, as British principal, at Irish interest, as on securities executed in Ireland, exchange at par, 10,390*l.* 1*s.* 2*d.*; fifthly, as British principal, at Irish interest, with exchange, on payments made by the Defendant at the rate of the day, 11,241*l.* 19*s.* 8*d.*

The Appellant excepted to the report, for that the Master, in his said report, stated that Robert Burrowes was the authorised agent of the Appellant, and as such, in the account between the Appellant and his partners with the said Gustavus

Rochfort, deceased, treated the sum of 10,000*l.*, advanced by the said banking house, as advanced in Irish currency : whereas he alleged that the said Robert Burrowes was merely the attorney-at-law of the said banking firm, and was not authorised as their agent, otherwise than as such attorney, to recover the amount of the said four judgments, and had no power, by any act as such attorney, to change the nature and character of the transactions between the said parties, and because no evidence of his being such authorised agent was laid before the said Master to justify such finding.

The Respondent also took exceptions to the report, for that it was stated by the said report that the sum of 10,000*l.* British was secured by the said bonds, warrants, and judgments : whereas he alleged that the Master should have stated that the sum so secured was the sum of 10,000*l.* Irish ; secondly, for that the report stated that the Defendant contended only upon one ground that the sum secured by the said securities should be considered as Irish currency, whereas the Defendant contended, upon various grounds and reasons, that the currency should be considered as Irish, and not British, currency ; thirdly, for that the said Master, by his said report, had credited all the payments made by the said late Gustavus Rochfort to the Appellant and his co-partners (save one), in discharge of the four judgments, whereas he should have credited each payment as made in discharge of one judgment only, and so on until each judgment was paid.

The cause came on for hearing upon the exceptions, and for further directions, upon the 24th of June, 1833 ; when the Lord Chancellor of

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Ireland, amongst other things, decreed that the Appellant's said exception should be overruled, and declared that the account, as taken by the Master, treating the sums secured by the four bonds in the report mentioned as Irish currency, and bearing interest at the rate of 6 per cent., be adopted, and that the sum of 7835*l.* 10*s.* 11*d.*, found to be due on that account, with interest at the rate of 6 per cent., on the sum of 3182*l.* 16*s.* 4*d.*, being the principal sum remaining due on foot thereof, are charges on the land and premises in the pleadings mentioned, with interest on the principal sums.

The appeal was against this decree.

For the Appellant, Mr. *Pemberton* and Mr. *Wigram*.

The only reasons for the order are, 1st, that the judgments are entered up in Ireland, that the bonds merge in the judgment, and that the debt is converted from an English into an Irish debt. 2dly, That the solicitor for the creditor accepted payments in part of the debt, and in carrying them to account treated them as Irish currency.

As to the first proposition, it is difficult to conceive upon what argument it is founded: the judgment is to secure 5000*l.* sterling, and it matters not where it is entered up. The judgment, in fact, is for the penalty in the bond. Suppose it had been for dollars; how could that have been converted into Irish currency? As to the second ground, the conduct of the legal agent, with only a special authority, cannot alter the terms expressed in the contract. If the language had been ambiguous, it might have given a construction to that which was doubtful. But no communication

of these unauthorised acts was made by the agent to the principal.

The only question is, whether sterling money and lawful money of Great Britain, in these instruments, can mean any thing but English currency. This question is decided in the case of *Lansdown v. Lansdown*. * The argument in that case was, that lawful money of Great Britain, in Ireland, meant Irish currency. The decision was, that it meant sterling money, that is, English currency. It was held, indeed, in that case, that the party was not entitled to the cost of remittance, because the power did not extend to raise more out of the estate than 3000*l.*, and there were no means of paying the cost of exchange. The abstract of that case made by the reporter shows the principle. The settlement was executed in England. The parties are all described as being resident there; and the power created by the instruments was to raise the sum in question by a charge upon lands in Ireland. The whole argument and principle of the judgment is strictly applicable to the case now before the House. Lord Eldon says (p. 85.), “ How would they deal “ with a recital that a man had advanced 12,000*l.* “ *sterling*, and it is provided that he shall receive “ 12,000*l.*? Would they contend that he must re- “ ceive so much less?” As to the cost of exchange, *Lansdown v. Lansdown* has no application. There the money was to be paid where the power was to operate, and where it was to be raised. This is the case of a creditor, and the loan is to be repaid in the place where he lent it. If there is a failure of payment, and he is desirous to recover his debt by

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* 2 Bligh, O. S. 60.

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process of law, he must be placed in the same situation as if the debt had been paid under the contract without compulsion.

It is the duty of the debtor to follow the creditor. If the money is remitted, the creditor is entitled to the expense of remittance. If the action had been brought in England, the amount recovered would have been 10,000*l.*; but the person of the debtor and the property being in Ireland, the creditor is obliged to proceed there: *Scot v. Bevan*.^{*} Lastly, the security being Irish, and the contract operating in Ireland, the creditor is entitled to interest at 6 per cent. This is so upon the ground that the security is worse and the risk greater (*Connor v. E. Bellamont*[†]); and the contract would not be illegal. Here the judgment recites the bond, and the decree is for what shall be found due upon the bond.

The original contract for loan of 10,000*l.* to Gustavus Rochfort, by the house of Noel and Company, having been made and entered into by the parties to it in London, it must be presumed that an advance in English sterling money, and not in Irish currency, was intended by both parties. The operative parts of each of the four bonds executed by Mr. Rochfort as a security for such advance or loan express him to be bound "to Richard Johnson, of &c., in the City of London, in the sum of 5000*l.* sterling, good and lawful money of Great Britain," and the respective warrants of attorney to confess judgment accompanying such bonds, authorise any attorney of the Court of Exchequer, or of any other of his Majesty's Courts of Record "in Ireland, Great

^{*} 2 Barn. & Ad.; and see 5 Mo. & P. [†] 2 Atk. 381.

“ Britain, or elsewhere,” at the suit of Richard Johnson, to confess judgment in such Court of Exchequer, and also in any other of his Majesty’s Courts of Record “ in Ireland, Great Britain, or “ elsewhere,” by acknowledging the action upon a declaration to be filed upon a bond of 5000*l.* sterling, “ good and lawful money of Great Britain ;” thereby showing, that the authority to enter up judgments on such warrants of attorney was not confined to the Courts of Ireland, and that English sterling money could alone be intended to be secured by such judgments, and not the currency of Ireland.

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The advance made to Mr. Rochfort, or on his behalf, in pursuance of the contract, and on the security of the four bonds, was made in English money by bills drawn in Ireland on the house of Noel and Company in London ; and by the custom of merchants, bills of exchange drawn in Ireland upon England are always paid in English money, and *vice versâ*, unless otherwise expressed ; and as the dates and amounts of such bills are specified in the general books of account of Messrs. Noel and Company (which have been used in evidence by the Respondent) without any expression to denote that the same were paid in other than English money, it is manifest that such bills were, in fact, paid in English money ; there is the admission of the Respondent, and direct evidence, for all these facts.

If, by any usage or practice in Ireland, the words “ sterling good and lawful money of Great Britain ” may at any time have been treated as meaning Irish currency, when the contract relates to Irish estates or property, and all the parties to

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the contract are domiciled in Ireland, such usage ought not to be held to affect parties to a contract who are not domiciled in Ireland, and still less for the purpose of reducing to the value of Irish currency a security given for English money, *bonâ fide* advanced. In contracts between English and Irish parties, the words "sterling good and lawful money of Great Britain" have but one meaning, and imply English money only.

The judgments respectively entered up on the bonds, and in pursuance of the warrants of attorney, purport to be at the suit of Richard Johnson, of, &c. ; and after shortly reciting the bonds, are each respectively expressed to be for 5000*l.* sterling and costs ; and therefore the construction and amount of such judgments ought to be governed by the recitals, and to imply sterling English money, and not Irish currency. And even if it should be considered that, as the judgments were entered up in Ireland, the sums expressed therein are to be recovered in Irish currency, yet, as the master was by the decree directed to take an account of what was due on foot of the judgments, and as the sums expressed in the judgments are penal sums, the Appellant is entitled under the decree to have an account taken of the sums of English money *bonâ fide* advanced, with interest, to the extent of the penal sums of the judgments.

The bonds having been executed, and the judgments entered up in Ireland, and the late as well as the present Mr. Rochfort being domiciled in Ireland, the *security* is exclusively Irish, although for English money ; and therefore the Appellant is entitled to have the account taken according to that rate of interest which the legislature has fixed

as the legal price of forbearance on debts upon Irish security ; that is to say, at the rate of 6*l.* per annum upon every 100*l.* of English money. In order to place a loan exclusively secured upon estates in Ireland on a par with one upon English security, it is necessary that it should bear 6 per cent. interest, and not five. Can it therefore be presumed, unless plainly expressed, that a debt bearing interest, contracted in England and secured exclusively in Ireland, shall bear less than Irish interest ?

Mr. Rochfort having from time to time made payments on account of the loan or advance of 10,000*l.* to the attorney of Noel and Company in Irish currency, the house of Noel and Company ought only to be held liable to credit the estate of Mr. Rochfort with so much on account as such payments would produce in English money at the rate of exchange of the day on which such payments were respectively made, or as if such payments had been made in Bank of England notes, or in good bills on England ; for, as Mr. Rochfort contracted for the loan and advance in London, and became bound to parties domiciled in London, and the bills were drawn in Ireland upon England, whereby Mr. Rochfort had the benefit of the rate of exchange of the day on those bills, his estate ought, in justice and good faith, to place Noel and Company in the same situation as when they made the advance, by repaying the value of the money which his estate received ; and this can only be done by adopting the 5th mode of taking the account, as found by the Master ; that is to say, by treating the principal money as English principal bearing Irish interest, and the payments made on account to be calculated

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at the rate of exchange of the day when they were respectively made.

For the Respondents, Mr. *Knight* and Mr. *Jacob*.

The judgment in this case does not turn upon the conduct of the agent as to the account, nor upon the merger of the bond and warrant of attorney in the judgment; but upon the nature of the instruments themselves, and the absence of any specialty in them. The question is, whether it was the effect of the instruments to establish a contract for English or Irish money. In England, we are accustomed to take it for granted upon such instruments that the contract is for English currency; but in conveyances it has been customary to add for distinction the words "current in England." In Ireland, by the words "*sterling*" and "*lawful money of Great Britain*," they invariably understand Irish currency. The judgment proceeded upon the common understanding of the country, and the construction of the Courts as to the words in question. In *Lansdown v. Lansdown*, the question was referred to the Common Pleas for their opinion, as a matter with which they were familiar: but in that case the deed was executed in England; the parties had estates both in England and Ireland; the charge was for 300*l*. "*lawful money of Great Britain*;" and that was held by the Common Pleas to be Irish currency. When the case came before the House of Lords, the question was not decided on those words taken alone, but upon a view of the whole instrument. The circumstance also that the parties were dealing with English as

well as Irish estates was taken into consideration, and that in the deed itself a distinction was made in this respect. It appears * that in the deed itself the Irish currency had been valued in English money, and so it was in the schedule. The parties moreover having in some parts of the deed spoken of "lawful money of Ireland," they could not mean the same thing by "lawful money of Great Britain." The House of Lords do not say in *Lansdowne v. Lansdowne*, that the Common Pleas had decided improperly, so far as the general principle was concerned, if they had only those words before them; but seem to think that either the deed was not before them, or that they had not paid sufficient attention to various clauses of the deed. Lord *Eldon* says †, "the Court whose opinion was "desired, certified that the jointure, being a rent-charge upon lands in Ireland, was payable in "Ireland and in Irish currency. The reason of "this opinion is to be collected only from the certificate, namely, that it is a charge upon lands in "Ireland. We are not informed of any other "reason. If that were the simple case, the matter "is clear according to settled principles of law." "But in this case," he added, "the meaning is to be "collected from all parts of the instrument" not disaffirming the general proposition, but relying upon the specialty of the case; and he says ‡, afterwards, "In this case the decision must be grounded upon "the instrument before us. *Lansdowne v. Lansdowne* is an exception to the rule, and an authority for the Respondent, as shewing what is the general understanding in Ireland as to such words.

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* Page 60.

† P. 38.

‡ P. 94.

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In *Sprowle v. Legge* *, it was the case of a contract by note to pay 161*l.* *sterling*. It appeared to have been made in Ireland, and it was stated by a witness, that Irish currency was called *sterling* in Ireland. The Court held that there was a variance between the declaration and the proof, because the declaration was for *sterling* money generally, which in English pleading is held to be of the currency of England. The decision in *Ladbroke v. Biggs* † was to the same effect. The jury there found that sterling meant Irish currency, and upon looking at the stamp, it appeared to be only sufficient to cover 500*l.* Irish currency. In the judgment of the Court below in this case, Chief Justice Bushe, observing upon *Lansdowne v. Lansdowne*, says, “the argument “that the word ‘*sterling*’ always means English “currency would go much too far;” and Judge Burton says, “*Lansdowne v. Lansdowne* was decided “on special grounds on a view of all parts of the “instrument; that it was a contract to pay in “British currency.” This shews the common apprehension and the understanding of the Courts of Justice, as to the import of these words in Irish transactions.

Burrowes, the agent of the Appellant, must have been well acquainted with the transaction; he receives payments on account, and treats it as Irish currency; and according to the fourth reason of the Appellant’s case, it seems that those who advised the Appellant apprehended that “*sterling*” upon an Irish contract means Irish currency, and their argument, that the residence of one of the parties

* 1 Barn. & Cres. p. 16.

† Batty’s Rep. 619. See *Kearney v. King*, 2 B. & A. 301.

in England creates a distinction admits the general rule. In the bill filed in Ireland, the debt is stated simply at 10,000*l.*, which must in Irish pleading mean Irish currency. The word "British" does not occur in the bill; there is no distinction, and no case is made by the bill for any such distinction; the prayer is for an account of what is due under the judgment, making no case for an account in English currency, which the Court below held that the Plaintiff was bound to make specially in his pleading if he meant to insist upon an account in a currency different from that of the country and jurisdiction. It is contended that the Appellant desired the money raised upon the bonds to be paid into the Irish Bank by the lenders, who were in England; but that leaves open the question what was to be paid; and if the bond was for Irish money, it cannot be a security for any thing more.

As to what was paid beyond that amount, if the Respondents are liable, it is only for a simple contract debt. If the question had been put in issue by the pleadings, we might have met the special case which is first raised upon the hearing and the appeal.

As to the claim of exchange, it is to be observed, that there might be a distinction between what is paid and what remains to be paid. But there is no ground for the claim. The creditor has an election to sue the debtor when he pleases. In this case he has obtained judgment on a bond in Ireland. The bond therefore and the debt merges in the judgment. The Defendant might have paid the money into Court, or perhaps to the attorney. Suppose execution had issued on the judgment, could the Sheriff have insisted upon the exchange?

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It is argued, that the action might have been brought in England upon the judgment in Ireland. The case might then have been different, and it might have been contended that the rule in *Scott v. Bevan** applied. But what shall satisfy a judgment cannot depend on variations in the residence of the parties. Execution cannot issue or be levied for more than the sum entered up and secured by the judgment.

As to *Delagal v. Naylor*†, it was in effect a question how to value Peruvian bonds in English money, and it was rightly held that it should be estimated as upon a bill of exchange. But such a decision does not bear upon a question as to what is to be paid upon a judgment.

The bonds and warrants of attorney, bearing date respectively the 3d of August, 1801, were executed in Ireland, where Gustavus Rochfort the obligor resided, upon Irish stamps, and according to the usual form of Irish securities; and the judgments were entered up thereon respectively in the Court of King's Bench, in Ireland, in all respects as Irish judgments, to secure the sums therein mentioned as of late Irish currency.

Robert Burrowes, acting on behalf of Richard Johnson and his co-partners, was the attorney on record who entered up the judgments upon the bonds and warrants at the suit of Richard Johnson; and Robert Burrowes, by an account subsequently furnished to Gustavus Rochfort, the conusor of the judgments, and bearing date the 31st of November, 1804, treated the same as Irish securities, and the sums secured thereby, and the payments made on foot thereof as Irish money, and therefore the Appellant, as assignee of Richard Johnson, is bound

* 2 Barn. & Ad. 78.

† 5 Moore & P. 443.

by the acts of Robert Burrowes, in relation to the bonds and judgments and the sums secured thereby.

The judgments so entered up at the suit of Richard Johnson against Gustavus Rochfort, deceased, are, in form and substance, declarations on record, that the sums of money respectively secured thereby were of Irish currency, and by entry of the judgments the Appellant, as assignee of the same, is estopped from averring that the same were entered up as securities for English money, and not for Irish money, according to the tenor and effect of the records of the several judgments.

If any mistake had occurred in the execution of the bonds and warrants, or in the entry of the judgments, by reason of the same respectively having been executed and entered up for Irish, and not English money, and if proof of such mistake would have altered and extended the effect of those instruments, the Appellant should have put such mistake in issue by his original or amended bills, and prayed relief accordingly; but that not having done so, it was not competent for him, upon the pleadings in this cause, to make such case either in the Master's office or at the hearing of the cause.

Pemberton in reply. —

The Respondents have not ventured to argue that the contract is not to be explained by the nature of the transaction; this indeed is the distinction which they take as to *Lansdowne v. Lansdowne*; and even in the answer of Rochfort it is stated, that the agreement was to advance "10,000*l. British.*" Upon the authorities cited for the Re-

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spondent, it is clear that bills are payable in the currency of the country where the acceptors reside. The bills in this case were by the agreement to be drawn on bankers resident in London, as the mode by which the advance was to be made and credit to be given in their books to Rochfort as the borrower: this also is admitted in the answer. The bonds were to secure the money thus advanced, and the expression contained in them, if ambiguous, is at least applicable to British money, which was in fact advanced. If the contract had been in Scotland, could it have been seriously contended that an advance of 10,000*l.* sterling could be repaid by 10,000 Scotch pounds? As to the argument that the debt may stand for British money, but that the security is only for Irish currency, the judgment might under the warrant of attorney have been entered up in England, how then is it a transaction merely Irish? The language if doubtful must be construed by the context. Even if it were a transaction between Irish parties only, it does not follow, that the loan is to be paid in Irish currency. In *Ladbroke v. Biggs*, the expression was not "money of Great Britain," but "sterling" only. Great Britain is not Ireland; and what is the substantial difference between "money of Great Britain" and money "current in Great Britain?" There is no authority to shew that "sterling money of Great Britain" has ever been construed to mean Irish currency.

The *Lord Chancellor*.—The bond has the words "money of Great Britain," but the judgment drops these words.

Reply. I am now arguing upon the bond. In *Ladbroke v. Biggs*, besides that the word is only "sterling," there was evidence that the

advance and loan were in Irish currency. In this case what other words could be reasonably required to secure repayment in English currency? England has no separate existence; it is now part of Great Britain. How do the Respondents answer *Lansdowne v. Lansdowne*? how do they deal with the difficulties raised by Lord Eldon in that case? He seems to have thought, and the House of Lords agreed, that sterling money, in that case, could not mean Irish currency; and unless the House will permit the Courts of Ireland to overrule their decisions, that authority must prevail. Lord Redesdale says, "There is no lawful money of Ireland; and upon a large view of the transaction and the securities, the words cannot receive any rational construction but that of English currency." As to *Sprowle v. Legge*, the bill there was drawn on a party in Dublin; there was no proof that it was drawn in Ireland. The Court said, that they could not judicially know that Dublin was in Ireland; and as the declaration was for sterling money, they could not receive evidence of any other currency.

Lord Plunket, in his judgment, says, the bill was for Irish currency, and that no case was made by it for English currency; and he observes, that the judgment being for 5000*l.* sterling, it could not be entered up for 5000*l.* British, but it might have been entered up for 5200*l.* as equivalent.

The difference between the language of the bond and judgment shews what the contract was from the additional words in the bond; and the judgment is for the penalty of the bond, which is amply sufficient for the debt. The Lord

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Chancellor of Ireland supposes, in his argument on this point, that the bill was to recover the amount of the judgments. That is not so; the bill is to recover what the judgment was given to secure, namely, 10,000*l.* lawful money of Great Britain, the judgment being for 20,000*l.* of whatever currency. The bill states the whole transaction; the facts and the proofs are all upon the record; for the answer admits the case as stated, and among other facts, that the borrower received the amount of the loan in British money. It is supposed by the Lord Chancellor of Ireland, that the decree was for an account of the debt in Irish currency; but that is misapprehension: the direction of the decree is to take the account upon the footing of the judgment, not as constituting the debt, but as the security. If the security had been for the transfer of stock, how could the decree have been for Irish currency? As to the rate of interest, it is argued, that if the contract is English, the interest upon the loan cannot be Irish: but it appears, from the authority of *O'Connor v. Bellamy*, that there may be legally an advance of English money by way of loan with a security for Irish interest. The question is whether such is the meaning of the contract.

As to the rate of exchange, it is argued, that if the creditor sues the debtor in the country where the debtor resides, he must receive his debt in the coin or currency of that country. There is no authority for the proposition, and if it were true, this case ought to be an exception, for the creditor is compelled to follow the debtor to his domicile, the site of his property. In this case, execution on the judgment would have been staid only upon the terms of doing equity, and that would be upon pay-

ing the cost of exchange, and putting the creditor in the same situation as if he had sued in England. In *Scott v. Bevan* the creditor sued in England, and the debt was paid with the expense of remittance. *Delagal v. Naylor* was decided on the same principle. So in the cases where legacies have been given in the currency of a foreign country, the decree has been for payment with the cost of exchange.

As to the supposed inconsistency arising from the payments received on account, and that which now remains to be paid, it is imaginary. The difficulty will easily be solved upon further directions. The question to a certain extent is involved in the exceptions. The money so paid was not received in Ireland, it was paid to the bankers there, and then remitted to the creditor in England *minus* the exchange. The question is, what credit upon these remittances is to be given by the Appellant. If it be an English transaction of loan upon a sound construction of the contract, the creditor is entitled to receive back in London the money advanced there, together with the expense of remittance.

The Lord Chancellor said, at the conclusion of the argument, that he would take time to consider the questions.

The Lord Chancellor.—My Lords, there was a case before your Lordships some time since, in which Sir Gerard Noel was the Appellant, and Gustavus Rochfort and others were the Respondents. It was an appeal from a decision of the Court of Chancery in Ireland; the effect of which decision was that Sir Gerard Noel, (who now represents the interests of a banking house which had formerly existed in London,) claiming as a creditor

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upon the estate of Mr. Rochfort, deceased, now represented by the Defendant, Gustavus Rochfort, was to have the amount of his debt paid in English currency. The question discussed upon this appeal was whether that direction of the Court of Chancery in Ireland was correct or not.

It appeared that Mr. Rochfort was desirous of entering into a partnership with a mercantile establishment in Dublin, and that, not having the means at command of raising the money which was required for the purpose of paying his portion of the capital, which was the sum of 10,000*l.*, an arrangement was entered into by which the banking house in London was to give him credit to the amount of 10,000*l.*, and the mode in which that sum of 10,000*l.* was so to be advanced by Mr. Rochfort, as his portion of the capital of the establishment in Dublin, was by the house in Dublin drawing upon the banking house in London.

This loan was of course to be secured to the London house. Mr. Rochfort lived in Ireland. The money was drawn from the banking house in London, as had been proposed, and the securities taken were four bonds, each for 5000*l.*, from Mr. Rochfort; — he was residing in Dublin, and the bonds were executed in Dublin. The loan was further secured by judgments to the amount of 20,000*l.*, four judgments of 5000*l.* each, under warrants of attorney executed by Mr. Rochfort. The ground upon which the Court of Chancery in Ireland came to the conclusion that Irish currency was to be the measure of the repayment of this loan appears to have been that the bonds were executed in Dublin, and that the debt was secured by Irish judgments.

The bonds were in these terms:—each bond was in a penalty of 5000*l.* to secure 2500*l.* of “sterling good and lawful money of Great Britain.” In these bonds the obligor was described as of the county of Westmeath: the obligees were described as of London, and, of course, the payment was to be to the obligees so described as residing in London. The warrants of attorney were to enter up judgment “in Ireland, England, or elsewhere;” and the amount of money to be secured by those judgments was expressed in the warrants of attorney in precisely the same terms as the security was expressed upon the face of the bonds. Judgments were entered up under these several warrants of attorney. The judgments were for 5000*l.* sterling; there, therefore, was a security for 20,000*l.* sterling by these four judgments, the prior transaction of the bonds, and the warrants of attorney, proving that the loan was for 10,000*l.*, and the payment reserved upon the bonds, and declared to be secured by the warrants of attorney, being each for 2500*l.* “of sterling good and lawful money of “Great Britain, with legal interest.”

Now, it is proved in this case, by the instruments, by the correspondence, and by the evidence in the cause, that, in point of fact, the 10,000*l.* was advanced in London, by drafts drawn upon a house in London, and paid, of course, in English money, and that the parties, therefore, who advanced the money, parted with 10,000*l.* of lawful money of Great Britain current in Great Britain. There was a variety of money transactions between the banking house in London and the mercantile establishment in Dublin, the result of which was, that a very large sum became due to the London house,

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which was secured upon some lands of Mr. Rochfort, in Ireland, which gave rise to a bill of foreclosure; and it is part of the evidence in the cause, that Mr. Rochfort, in his answer to that bill of foreclosure, admitted that the bonds and judgments were to secure the 10,000*l.* advanced by the banking house in London in the way which I have stated. That fact being distinctly admitted, and appearing, indeed, on the face of the instruments, is also proved by various letters and the evidence in the cause; it may therefore be taken as a fact not disputed, and upon which the legal results must necessarily ensue, that the 10,000*l.* was advanced in London, in the currency of this country.

A suit was afterwards instituted for the purpose of administering the estate of Mr. Rochfort. In that suit the ordinary decree was made in the year 1831, by which it was referred to the Master to take an account of what was due to the Plaintiff, upon the “four judgments obtained by Richard “Johnson against Gustavus Rochfort, deceased, as “of Trinity Term, 1801, for principal, interest, and “costs.” The Master made his report upon the 31st of May, 1833; and in that report he states, that Gustavus Rochfort, on the 3d of August, 1801, “executed his four several bonds and warrants of attorney, for confessing judgments thereon to Richard Johnson,” now represented by Sir Gerard Noel, “in trust for himself and the other “persons in the firm of Edward Templer and Co., “each in the sum of 5000*l.* sterling, lawful money “of Great Britain, conditioned for the payment of “2500*l.*, of like lawful money, and which bonds” he found “were executed in Ireland;” and he found “that the said Richard Johnson did in or as of

“ Trinity term, 1801, obtain four several judgments on said bonds, in his Majesty’s Court of King’s Bench in Ireland, against the said Gustavus Rochfort, deceased, each in the penal sum of 5000*l*.” He found “ that the sum of 10,000*l*. secured by the said four bonds, was advanced and paid by the said Richard Johnson, as one of the partners in the said banking house of Noel, Templer, and Co., to the said Gustavus Rochfort, or for his use, in British currency, and that there is due to the Plaintiff the sum of 8,441*l*. 13*s*. 6*d*., being principal and interest, at 5 per cent., as appears by the second schedule, to be in my report annexed. But, on the part of the Defendant, it was contended that the said bonds and warrants having been executed in Ireland, and the judgments thereon entered in the Court of King’s Bench in Ireland, it appears from an account furnished by Robert Burrowes, Esquire, as attorney for the said banking house, in the year 1804, proved in this cause as Exhibit A, that the said Robert Burrowes, as such attorney and authorised agent of Plaintiffs, in that account, treated the sums so advanced as Irish currency, and charged interest at the rate of 6 per cent., and that I should treat the sum secured as principal money Irish currency, and report accordingly. On the part of the Plaintiffs, it was contended, that I should treat the sum advanced as British currency, and payable with British interest, at 5 per cent.; and after I had prepared the draft of my report, in which I treated the sum advanced as British principal and British interest, the same counsel contended that I should report that the sum advanced, being British prin-

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“pal in Irish currency, should be liable to 6 per cent. interest, and that I should report that the Plaintiffs were entitled to the exchange on the payments made by the Defendant at the rate of the day; but the Defendant insisted that, under any circumstances, he was not liable to any exchange, but was entitled to make the payments in Ireland without reference to any remittances to London.” The Master then says, that he concurred in opinion with the Defendant upon that point, and proceeds thus: “But with a view to save time and expense, I have taken the accounts in five different ways; first, as British principal at 5 per cent. interest; secondly, as Irish principal and Irish interest; thirdly, as British principal and English interest, with exchange on the payments made by the Defendant at the rate of the day; fourthly, as British principal and Irish interest, as on securities executed in Ireland; and lastly, as British principal and Irish interest, with exchange on payments made by the Defendant at the rate of the day;” and he submitted to the Court which of those several modes of taking the account ought to be adopted. Then the Master states what, according to those different modes of taking the account, would be the sum due to the Appellant.

The Master, therefore, finds the facts which are not disputed. There is no exception to the report as to the mode in which the money was advanced, viz. that it was advanced in London, in British money, and transmitted to Ireland, and there secured by the bonds and judgments, the substance of which I have stated. The Master also reports that Robert Burrowes, the attorney for the Lon-

don banking house, in the year 1804, deposed, in this case, that he, as such attorney and authorised agent of the Plaintiffs in that account, treated the sums so advanced as Irish currency. Upon this point an exception was taken to the Master's report, founded upon a supposed statement in the report, that Mr. Burrowes had been the attorney and authorised agent for the purpose of settling this account. That exception was overruled, and I think correctly overruled, not because there was evidence that Mr. Burrowes had been an agent authorised for that purpose, but because the Master did not find in his report that he was such authorised agent. He merely stated that he acted as such authorised agent, and, in that character, had settled the account; whereas the proposition raised in the exception was, that the Master had found that he was the authorised agent for the purpose of settling the account. But that is not very material for the purpose of deciding the merits of this case. The exception raised a point which was not raised upon the face of the report; and, I think, there is no ground of complaint on account of the exception having been overruled. That, however, leaves the question between the parties entirely open upon the facts, as to this point, stated and proved in the cause.

The real and substantial ground of appeal is the declaration and direction of the order that the account as taken by the Master, treating the sum secured by the four bonds as Irish currency, and bearing interest at 6 per cent., should be allowed. The effect of that decision is, that the debt of 10,000*l.* advanced in London, in English money, in a suit in which the debts of the borrower are to

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be paid is to be considered as satisfied by 10,000*l.*, Irish currency being of much less value.

The first question which occurs is, what must have been the intention of the parties at the time when this transaction took place? It is no unusual thing to lend money in this country upon Irish or colonial securities; is it necessary that the lender should guard himself by a special contract from a conclusion in law, that the debt is to be repaid, not in the currency according to the value at which it was advanced, but that it is to be repaid in the money of the country where the borrower may happen to live, or in the country where the instrument is executed for the purpose of securing the debt?

Two grounds were principally relied upon by the Respondents. First, that the securities, the bonds, and the judgments, were Irish. Secondly, that Mr. Burrowes, the attorney in Ireland for the Plaintiff's house in England, had settled accounts in which he had treated the loan as payable in Irish currency. As to the securities, the question hardly arises, the bonds and the warrants of attorney being in their terms to secure "sterling good" and lawful money of Great Britain." The judgments indeed are for sterling money only, which, it is said, is a term used in Ireland to denote the currency at that time prevailing in Ireland. But the judgments in this case do not constitute the debt. If they did, the 20,000*l.*, and not the 10,000*l.*, would have been the sum to be recovered. But the judgments are mere securities for the debt really due; and if it be true that the debt would have been satisfied by the payment of 10,000*l.* Irish currency, which is one of the arguments insisted

upon, it only proves that the security was of less value than was supposed; not that the debt secured was to be discharged by a payment of less money than was advanced. A security may be taken in goods, in lands, or in judgments for Irish money, or French francs, or any other description of money, and the amount of the debt to be secured remains the same. The question is, what is due upon the security, not what is the value of the security itself. But the question of what is due upon the security can only be answered by looking at the origin of the transaction and the contract between the parties. The origin of the transaction was the advance of 10,000*l.* English money, and the contract established by the bond was to repay the sum in "sterling good and lawful money of Great Britain." How can such a debt under such a contract be satisfied by a payment in Irish currency?

In support of the Respondent's claim, no case was cited which really supported their proposition; but on the part of the Appellant, the very important case of *Lansdowne v. Lansdowne*, in the third volume of Mr. Bligh's reports, was cited. In that case, the marriage settlements of English and Irish estates contained a power to charge the Irish estates with a jointure of 3000*l.* "*of lawful money of Great Britain:*" the power was executed by a charge of 3000*l.* of lawful money of Great Britain. In a suit to recover that jointure a question arose in the Court of Chancery in Ireland, as to whether that jointure was to be paid in English or in Irish money. A case was sent by the Court of Chancery in Ireland, to the Court of Common Pleas in that country, which Court certified that the jointure

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was payable in Irish currency, and the Court of Chancery so decreed; but upon an appeal to this House, that decree of the Court of Chancery in Ireland was reversed, and it was declared, that the jointure was payable in English money, and not in Irish currency. In that case a rent-charge issuing out of an Irish estate, which was described as 8000*l.* of lawful money of Great Britain, was, by the force of those words, connected with the history of the transaction, held to be payable in English money. Must not then the same words have at least an equal effect upon a loan contracted in England, not charged by the contract upon any Irish property, but secured by a bond executed indeed in Ireland, and by a judgment in that country, but the bond being so executed in Ireland, and the judgment obtained there, probably only because it happened that the Defendant was living in that country; the warrants of attorney, moreover, enabling the party to enter up judgment in Ireland, in England, or elsewhere.

It appears to me, therefore, upon principle and the authority of that case of *Lansdowne v. Lansdowne*, that the 10,000*l.* was payable in English money, and not in Irish currency; and this which I consider as proved to be the contract between the parties, cannot be affected by what Mr. Burrowes, the Irish attorney of the London House, appears to have done. It is not pretended that he had any authority to alter the contract, or to enter into any new contract between the parties. It is natural enough, that he, an Irish attorney settling the account in Dublin, should have treated the money as money to be estimated in Irish currency; but that cannot alter the rights of the parties.

The next question is as to the interest; and it must, in the first place, be observed, that this is not the case of a debt secured upon Irish property. The opinion which I have expressed, as to the former part of the case, proceeds upon the ground of the transaction, and the contract having been altogether English. It follows from that, that the meaning of the parties must have been to secure legal interest; that is, legal interest according to the law of the country in which the contract was made, and in which the money was advanced. In the case of *Connor v. Lord Bellamont**, which is but imperfectly reported, and which was cited in order to shew that Irish interest ought to be allowed, there was upon the face of the contract, according to the report, a reservation of 7 per cent., and that was a charge upon lands in Ireland.

The only remaining question is, whether the money is to be paid as if payable in Ireland, or whether it is to be calculated as if payable in London; that is, whether the exchange existing at those periods between the two countries is to be taken into the account. The contract is silent as to the place of payment. But it cannot be supposed that London bankers, advancing money in the course of their business, look to payment in any other place than where they are carrying on their business, that is in London. Had the borrower happened to be in England the bonds would have been English, and the judgments would have been English. Here the whole transaction was English, and in such a case, the lenders have a right to re-

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* 2 Atkins, 382.

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ceive payment where the money is advanced. Such was the principle of the decision in the case of *Phipps v. Lord Anglesea**, although there was a charge in the bonds upon lands in Ireland. In the case of *Lansdowne v. Lansdowne*, indeed, Lord Eldon thought that the jointure, though payable in English money, was not payable in England; but in that case, there was no contract for payment, the right existed only in the charge. It was a charge that affected property in Ireland. Lord Eldon, in that case, alludes to the case of *Phipps v. Lord Anglesea* and several other cases with approbation.

I am therefore of opinion, that the account must be taken upon the footing of money to be paid in London; that the repayment is to be with interest at 5 per cent.; and that the calculation must be made with allowance according to the rate of exchange at which the several sums of money were remitted from Ireland to this country. If that should be your Lordships' opinion, the object will be carried into effect by substituting a declaration in lieu of that which now appears in the decree: as the decree now stands, it "declares that the Master in calculating the sum secured by the four bonds ought to consider them as Irish currency, bearing interest at the rate of 6 per cent." The substitution which I would submit to your Lordships is this, that the Master in making his calculation should consider the debt as English money, bearing interest at 5 per cent. and payable in London, that is, with the value of the exchange at the rate of the day, and that the

* 5 Viner's Abridg. 209. pl. 8.

interest of 5 per cent. should be calculated upon such a sum as shall appear to be due, consisting of principal and interest. I therefore move your Lordships, that the decree of the Court of Chancery be varied accordingly.

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Decree affirmed with the variations proposed.

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ENGLAND.

(COURT OF CHANCERY.)

The Right Honourable JOHN } *Appellant*;
 GEORGE, Earl of DURHAM, - }

JOHN WHARTON and SUSAN MARY }
 ANN, his Wife, and THOMAS } *Respondents*.
 BARRETT LENNARD, - }

W. L., by will dated in 1772, devised all his lands, subject to a term of 1000 years, to his brother J. L. in fee. The trusts of the term were to raise 15,000*l.* in augmentation of the portions of his nephew R. and his nieces J. D. and S. M. A. L. daughters of J. L., to be divided equally between them. The estate having vested in J. L., he by his will, dated in 1788, gave to his daughter J. D. a sum of 10,000*l.* He also gave in trust for his daughter S. M. A. L. 10,000*l.*, half to be paid three years after his death, and the remaining half six years after his death, with interest at 4 per cent. from the time of his death, unless his son W. H. L. should choose to pay the same sooner; the interest of this legacy to be paid to his said daughter during her life, and after her decease to pay the principal among her children, according to her appointment, &c. By the will it was declared that the legacies of 10,000*l.* so given in trust for his daughters, were over and above the legacies of 5000*l.* given to them by the will of his brother W. L.; and subject to the charge of legacies, &c., he gave all his freehold estates, &c. to W. H. L. for life; remainder to his first and other sons, &c. in tail.

By articles of agreement made upon the marriage of S. M. A. L., and dated 1790, J. L. agreed to give to J. W., the intended husband, 15,000*l.* as her marriage portion; in consideration of which, J. W. agreed to make provision for pin money, jointure, and portions for the wife and the children of the marriage by a settlement to be thereafter executed; and it was agreed and declared that the portion of 15,000*l.* was in full satisfaction and discharge of all sums of money which S. M. A. L. was entitled to, or could claim by virtue of any

gift, bequest, or devise under the will of W. L. The marriage having been solemnised, a settlement pursuant to the articles was executed in 1793, and 15,000*l.*, the marriage portion, was paid by J. L. to J. W.

In 1794, J. L. died; and his will, having been proved by W. H. L. his sole executor, was read in the presence of many members of the family, and, among others, the trustees of the marriage articles and settlement. In 1795, W. H. L. made his will, and died in 1797, when the Appellant became, under the will of J. L., tenant in tail of the lands, &c. charged by the will of J. L. with the legacy of 10,000*l.* in favour of S. M. A. L.

In 1826, for the first time, J. W. and his wife (S. M. A. L.) claimed the said legacy to be paid with interest according to the trusts created by the will of J. L., and, in 1829, filed a bill in Chancery against the Appellant and others to compel the payment. In 1832, a decree was made by the Vice-Chancellor according to the prayer of the bill, and in 1835, this decree was affirmed by the Lord Chancellor. But on appeal to parliament the decree was reversed, on the ground that the settlement was an ademption and satisfaction of the legacy.

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WILLIAM LAMBTON, by his will duly signed and attested, as by law required for devising freehold estates, and bearing date the 13th April, 1772, devised his real estates, to certain trustees therein named, for the term of one thousand years, in trust, to raise the sum of 15,000*l.*, for or in augmentation of the portions of his nephew, Ralph John Lambton, and his nieces, Jane Dorothy Lambton and Susan Mary Ann Lambton (now the Respondent, Susan Mary Ann Wharton), equally to be divided between them, the shares of the said nieces to be paid to them respectively at their respective ages of twenty-one years, or days of their marriage, which should first happen, so as such marriages should be with the consent and approbation of the testator's brother, John Lambton.

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And upon this further trust, that the said trustees should in the meantime, and until the respective shares of his said nephew and nieces should respectively become payable, levy and raise for the maintenance and education of his said nephew and nieces respectively, such yearly or other sum, not exceeding one year with another the interest of their respective portions thereby provided for them, at the rate of 3 per cent. per annum, as his said brother, John Lambton, should from time to time in his discretion think fit and appoint. And he devised his real estates, charged as aforesaid, unto his said brother, John Lambton, and^a his heirs, in fee simple.

William Lambton (the above-named testator) died in 1774, without having revoked, or in any manner altered the said devise; and his brother, then General John Lambton, thereupon entered into, and thenceforth during his life continued in possession of, the real estates charged with the legacy, and the receipt of the rents and profits thereof.

General John Lambton being at the time of making his will, hereinafter in part set forth, and thenceforth up to and at the time of his death, seized in fee simple of divers freehold estates, including the real estates devised and charged as aforesaid, and being possessed of personal estate of considerable amount, made his will, signed and attested so as to pass freehold estates, bearing date the 17th November, 1788, which was (so far as it is material to be here stated) as follows: “ I give
“ unto Thomas Lyon and William Loraine the
“ further sum of 10,000*l.*, to be paid to them, the
“ said Thomas Lyon and William Loraine, their
“ executors or administrators, in manner following;

“ (that is to say,) the sum of 5000*l.* at the end of
 “ three years next after my decease, and the re-
 “ maining 5000*l.* at the end of six years next after
 “ my decease, with interest after the rate of 4*l.* for
 “ each 100*l.* by the year from the time of my de-
 “ cease ; unless my son, William Henry Lambton,
 “ should choose to pay the same sooner, which it
 “ is my mind and will that the said William
 “ Henry Lambton may do, if he shall think fit,
 “ giving to the said Thomas Lyon and William
 “ Loraine six calendar months’ notice in writing,
 “ in trust that they, the said Thomas Lyon and
 “ William Loraine, their executors or administra-
 “ tors, shall from time to time, by and with the
 “ consent of my said daughter, Susan Mary Ann
 “ Lambton (the Respondent), to be signified in
 “ writing under her hand, place out the said sum
 “ of 10,000*l.* in the funds, or upon Government or
 “ real securities, at interest, and also from time to
 “ time with the like consent, to call in the principal
 “ money so to be placed out, and again to place out the
 “ same at interest on new or other securities of the
 “ like nature, and shall apply the interest, dividends,
 “ and proceeds thereof, and the interest thereof,
 “ until the same shall be paid to them the said
 “ Thomas Lyon and William Loraine, their execu-
 “ tors or administrators as aforesaid, to my said
 “ daughter, Susan Mary Ann Lambton during her
 “ life ; and after her decease, then upon trust that
 “ they, the said Thomas Lyon and William Loraine,
 “ their executors or administrators, shall pay and
 “ apply the said sum of 10,000*l.* unto and amongst
 “ all and every the child and children of my said
 “ daughter lawfully to be begotten, at such time or
 “ times, and in such parts, shares, and proportions,

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“ and under and subject to such restrictions, as
“ my said daughter shall, notwithstanding her co-
“ verture, and whether covert or sole, by any deed
“ or writing executed in the presence of and at-
“ tested by two or more credible witnesses, or by
“ her last will and testament in writing, or any
“ writing purporting to be her last will and testa-
“ ment, to be executed in the presence of and to
“ be attested by the like number of credible wit-
“ nesses, direct, limit, declare, and appoint; and in
“ default thereof shall pay and apply the same
“ equally and amongst all and every the child or
“ children of my said daughter, share and share
“ alike, the share and shares of such of them as
“ shall be a son or sons, to belong to and be an
“ interest vested in him or them, at his or their re-
“ spective age or ages of twenty-one years, and in
“ such of them as shall be a daughter or daughters,
“ at her or their respective age or ages of twenty-
“ one years, or day or days of marriage, which shall
“ first happen; but to be paid at the respective
“ times hereinafter mentioned; (that is to say),” &c.

Then followed provisions as to the times of pay-
ment and trusts for maintenance and for advance-
ment.

The will concluded as follows: “ Provided
“ always, that in case there shall be no child or
“ children of my said daughter lawfully begotten,
“ or, being such, all of them, being sons, shall hap-
“ pen to die before they shall attain the age of
“ twenty-one years, and all of them, being daughters,
“ shall die before they shall attain that age or
“ marry, then it is my mind and will, that the
“ said sum of 10,000*l.*, or so much thereof as
“ shall not have been advanced and paid for the
“ advancement of any of the children of my said

“ daughter, as aforesaid, shall become a part of my
 “ personal estate, and to be disposed of with the
 “ same as hereinafter mentioned. And I do here-
 “ by declare, that the sum of 35,000*l.* given to the
 “ said Thomas Lyon and William Loraine to be
 “ laid out, as in the former part of my said will
 “ mentioned, in trust for my son, Ralph John
 “ Lambton, and the said 10,000*l.* and 10,000*l.* so
 “ given to the said Thomas Lyon and William
 “ Loraine, as aforesaid, in trust for my said daugh-
 “ ters, is over and above the several sums of 5000*l.*
 “ 5000*l.* and 5000*l.*, devised to them in and by
 “ the will of my brother, William Lambton. And
 “ I devise all the residue of my freehold and
 “ copyhold estates whatsoever, charged and charge-
 “ able with the payment of all my just debts, lega-
 “ cies, and funeral expenses, or so much thereof
 “ as my personal estate is not sufficient to discharge,
 “ unto my son, William Henry Lambton, and his
 “ assigns, for his life, with remainder to trustees,
 “ to preserve contingent remainders ; with remain-
 “ der to the first, second, third, fourth, fifth, and
 “ sixth, and all and every other the son and sons
 “ of the said William Henry Lambton, severally,
 “ successively, and in remainder, one after another,
 “ in order and course as they respectively shall be
 “ in priority of birth, and to the several and re-
 “ spective heirs male of their bodies, the elder of
 “ such sons, and the heirs male of his body, always
 “ to be preferred : with divers remainders over.
 “ And I bequeath all the residue of my personal
 “ estate (except certain colliery stock) charged
 “ and chargeable with the payment of my debts,
 “ legacies, and funeral expenses, to my son,
 “ William Henry Lambton. And I appoint my

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“ said son, William Henry Lambton, sole executor  
“ of my said will.”

General John Lambton subsequently made several codicils to his will, but he did not by any of such codicils revoke, or in any manner alter the bequest in favour of the Respondent, Mrs. Wharton, and her issue; and in some of such codicils he ratified and confirmed his will.

By articles of agreement, dated October 9. 1790, in contemplation of the marriage of John Wharton and Susan Mary Ann Lambton, and made “ between John Wharton, of the first part;  
“ Susan Mary Ann Lambton, of the second part;  
“ General John Lambton, of the third part; and  
“ William Henry Lambton and Ralph John Lambton, of the fourth part;” reciting, among other things, that “ on the treaty for the said intended  
“ marriage it was agreed that in consideration as  
“ well of the said intended marriage, as of the  
“ sum of 15,000*l.*, which John Lambton had  
“ agreed to give to John Wharton, as the marriage portion of Susan Mary Ann Lambton,  
“ John Wharton should secure to Susan Mary Ann Lambton, during the joint lives of herself and  
“ John Wharton, the payment of the annual sum  
“ of 500*l.*, by the year, for her separate use during  
“ the coverture, for pin money; and also that John  
“ Wharton should secure to Susan Mary Ann Lambton yearly, during her life, in case she  
“ should survive John Wharton, the payment of  
“ the clear annual sum or rent-charge of 1200*l.*  
“ as in the nature of a jointure, &c.; and should  
“ also secure such portions for the daughters and  
“ younger sons of the marriage as thereafter  
“ mentioned. And it appearing, from the present

“situation and circumstances of the said John  
 “Wharton’s property, that it would be inexpe-  
 “dient to make an actual settlement to the effect  
 “agreed upon, till after the respective deaths of  
 “Mrs. Margaret Wharton and Mrs. Ann Farquhar-  
 “son, two of the aunts of John Wharton, it has  
 “been further agreed that the said John Wharton  
 “should enter into such covenants as thereafter  
 “mentioned, and that the payment of the sum of  
 “15,000*l.*, the intended portion of Susan Mary  
 “Ann Lambton, should be postponed in manner  
 “thereinafter mentioned, and that, in the mean-  
 “time, the said sum of 15,000*l.* should remain  
 “and be subservient to the purposes of such in-  
 “tended settlement in manner thereafter par-  
 “ticularly mentioned: it was witnessed that in  
 “consideration of the said intended marriage,  
 “and of the sum of 15,000*l.*, thereafter cove-  
 “nanted to be paid by John Lambton, as the por-  
 “tion or fortune of his said daughter, and to the  
 “intent that the said agreement might be carried  
 “into effect according to the true intent and mean-  
 “ing thereof,” &c. Then followed the agreement  
 for making provision for pin money, and for the  
 jointure of the wife, and portions for the children of  
 the marriage, by a settlement to be executed after  
 the death of the parties before mentioned. The  
 articles then contained a covenant by John Lamb-  
 ton to pay to John Wharton 15,000*l.* as a marriage  
 portion, in such manner, and upon such conditions  
 and consideration, as therein mentioned; and con-  
 cluded as follows: “And lastly, it is hereby agreed,  
 “and declared by and between the parties to  
 “these presents, and particularly the said John  
 “Lambton, John Wharton, and Susan Mary Ann

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“ Lambton, do severally agree and declare that  
 “ the said portion or sum of 15,000*l.*, hereinbefore  
 “ by these presents covenanted and agreed to be  
 “ paid by the said John Lambton, as aforesaid, is  
 “ in full satisfaction and discharge of all and every  
 “ sum and sums of money, which the said Susan  
 “ Mary Ann Lambton is entitled to, or can or  
 “ may claim, or be entitled to, by virtue of any  
 “ gift, bequest, or devise, in or under the will of  
 “ William Lambton, late of Lambton Hall afore-  
 “ said, Esquire, the late uncle of the said Susan  
 “ Mary Ann Lambton.”

Immediately after the date and execution of the marriage articles, the marriage between the Respondents, Mr. and Mrs. Wharton, was solemnised.

The real estate of Mr. Wharton shortly afterwards having fallen into possession, by the deaths of the two preceding tenants for life, an indenture of settlement, bearing date the 21st of August, 1793, was, in pursuance and in execution of the articles, made and executed by General John Lambton and the Respondents, Mr. and Mrs. Wharton, and other parties. This settlement was in strict conformity with the articles, and contained a clause in the words following: “ And lastly,  
 “ the said John Wharton, for himself, his heirs,  
 “ executors, and administrators, and for the said  
 “ Susan Mary Ann, his wife, doth covenant, pro-  
 “ mise, and agree to and with the said John Lamb-  
 “ ton, his executors, administrators, and assigns,  
 “ by these presents, that he the said John Wharton,  
 “ his executors or administrators, shall and will, at  
 “ any time hereafter, at the request and expense  
 “ of the said John Lambton, his executors, admi-  
 “ nistrators, or assigns, do or execute any act that

“ shall be necessary for releasing or discharging all  
 “ and every, or any sum or sums of money, which  
 “ the said Susan Mary Ann, his wife, or the said  
 “ John Wharton in her right, is or are entitled to,  
 “ by virtue of any gift, bequest, or devise, in or  
 “ under the will of the said William Lambton, her  
 “ uncle.”

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On the execution of this settlement, the sum of 15,000*l.* was paid by General John Lambton to the Respondent, Mr. Wharton, according to the agreement.

General John Lambton died in March, 1794, without having revoked or altered the bequest of 10,000*l.* contained in his will. He left two sons, namely, William Henry Lambton, his eldest son, and Ralph John Lambton, and two daughters, namely, Jane Dorothy Lambton and the Respondent, Susan Mary Ann Wharton, him surviving; and shortly after his death, William Henry Lambton proved his will, together with the several codicils thereto, in the proper Ecclesiastical Court, and possessed the personal estate, and entered into the receipt of the rents and profits of the real estates of the testator, General John Lambton. The will was read in the presence of many members of the family, including the trustees of the marriage settlement of Mr. and Mrs. Wharton.

William Henry Lambton died in November, 1797, leaving the Appellant, then a minor (since created Earl of Durham), his only son, who thereupon, under the will of General John Lambton, became entitled, as tenant in tail in possession, to the real estates thereby devised, and which had been charged with the sum of 10,000*l.* and interest, in favour of the Respondent, Mrs. Wharton, and her children.

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The Appellant, upon attaining his majority, accordingly entered into the receipt of the rents and profits thereof.

There was issue of the marriage between the Respondents, Mr. and Mrs. Wharton, two children only, namely, Susan, born on the 1st of April, 1792, and Margaret, born on the 3d of August, 1794. Both of these daughters attained their ages of twenty-one years, and the former (Susan) died unmarried and intestate in May, 1820, and letters of administration of her goods, chattels, rights, and credits, were granted by the proper Ecclesiastical Court to her father, the Respondent, John Wharton, who thereupon became entitled to all the share and interest which Susan Wharton might have in the said sum of 10,000*l.*, and its interest. Miss Margaret Wharton, on the 3d of August, 1815, intermarried with the Respondent, Thomas Barrett Lennard, and in 1818 died; whereupon Mr. Thomas Barrett Lennard procured to be granted to him by the proper Ecclesiastical Court, letters of administration of the goods, chattels, rights, and credits of his late wife, Margaret Lennard, and he thereby became entitled to all her share and interest (if any) in the said sum of 10,000*l.*, and its interest.

In 1824 Mr. and Mrs. Wharton claimed the legacy of 10,000*l.*, with interest, and in 1829 filed a bill, &c. against the Appellant to compel the payment; alleging that they had not been present at the reading of the will, and were uninformed and ignorant of the bequest until application was made to them, on behalf of the Appellant, to release the legacy, in order that he might make a good title to the estate, under a contract for sale of it to Lord Eldon.

The Appellant, the Earl of Durham, by his answer to the bill, admitted that no part of the legacy of 10,000*l.*, or of the interest thereon, had been raised or paid, and that the trusts, for raising and paying the same had never been performed or executed; and, by way of defence, he insisted (notwithstanding the articles and marriage settlement and the trusts created by the General's will) that the 10,000*l.* bequeathed by the General was satisfied by the 15,000*l.* paid on the marriage of the Respondents, Mr. and Mrs. Wharton.

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The other Defendants also put in their answers to the bill, and the cause being at issue, witnesses were examined. The agent of Lord Durham proved that upon application to Mr. and Mrs. Wharton, on behalf of Lord Durham, to obtain a release of the legacy, they appeared to be, and said that they had been, ignorant that such a legacy had been bequeathed by the will. Publication having passed, the cause came on to be heard before his Honour the Vice-Chancellor, on the 21st of November, 1832; and on the 26th of the same month his Honour was pleased, by his decree, to declare (*inter alia*), that the Plaintiffs (the Respondents, John Wharton and Susan Mary Ann, his wife, in her right, and the Respondent, John Wharton, as the administrator of the goods, chattels, and credits of the said Susan Wharton, deceased, and the Defendant, Thomas Barrett Lennard, the administrator of the goods, chattels, and credits of his late wife, the said Margaret Lennard, deceased) were, under and by virtue of the will of the said John Lambton, deceased, the testator in the pleadings named, entitled to have the sum of 10,000*l.*, together with interest thereon, after the rate of

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4 per cent. per annum, from the same testator's death, raised out of the same testator's freehold, copyhold, and personal estates; and it was ordered that it should be referred to one of the Masters of the Court to take the usual accounts consequential on such declaration.\*

The Appellant being dissatisfied with the decree, presented a petition of rehearing and appeal to the Lord Chancellor, praying that the decree might be reversed; and this petition coming on to be heard before the Lord Chancellor on the 29th of July, 1834, he, on the 5th of August following, ordered and decreed, that the petition should be dismissed, and the decree of the Vice-Chancellor affirmed with costs.†

After the decree of the Lord Chancellor, John Edmond Dowdeswell, the Master to whom the cause was referred, made his report, finding a large sum of money to be due from the Appellant in respect of the principal and interest of the legacy of 10,000*l.*, and which report was afterwards confirmed absolutely.

From the decree and subsequent orders in the cause, the Appellant presented his petition of appeal to the House of Lords, praying that the same might be reversed.

For the Appellant, Mr. *Bickersteth* and Mr. *Pemberton*.

It is a settled rule in a Court of Equity, that a legacy given by a father to a child is adeemed by a portion subsequently advanced by the father to or upon the marriage of such child; and the

\* 5 Simons, 305.

† 3 M. & K. 472.

propriety of applying such rule to this case is confirmed by the identity of the sum advanced on the marriage with the amount of the sum which the testator showed, by his will, he intended to be the amount of his daughter's portion. And although it was supposed in the Court below that the sums did not precisely correspond, because there might have been an arrear of interest on the 5000*l.* due to Mrs. Wharton at the time of her marriage, yet when it is recollected that, under the will of William Lambton, no interest was payable in respect of the sum of 5000*l.* until Mrs. Wharton attained the age of twenty-one years, or, if payable at all, was payable to her father, John Lambton, for her maintenance, and that after she attained that age, and until her marriage, she resided with her father, it cannot be presumed that any arrear of interest was due to her at that time.

Supposing the legacy not to have been adeemed, all claim to the interest, which belongs exclusively to Mr. Wharton, is barred by the length of time which he has permitted to elapse without bringing it forward; it being, as it is submitted, under the circumstances, impossible to attribute ignorance to him of the fact of such bequest having been made.

For the Respondents, Sir *W. Horne*, and Mr. *Knight*, (and Mr. *W. Pole*).

The language of the marriage articles and subsequent settlement, to each of which General Lambton was an executing party, is inconsistent with the existence of any intention on his part that the portion of 15,000*l.*, expressed as it was to be in satisfaction of his daughter's claims under the uncle's will,

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should be also in satisfaction of a legacy under General Lambton's own will.

The legacy of 10,000*l.* in question was given for the benefit of the children of the Respondent, Mrs. Wharton, as well as herself, and not of herself only.

The trusts of the marriage articles and subsequent settlement, so far as they are for the benefit of any issue of the Respondent, Mrs. Wharton, are materially different from the trusts created by General Lambton's will of the legacy in question, for the benefit of Mrs. Wharton's issue.

The question of satisfaction is concluded by the authority of *Baugh v. Read*.\*

If the delay of the suit could be material in a case where the non-payment of a legacy sued for is admitted, as it is in this case, and where all presumption of payment is necessarily excluded, the delay is here sufficiently accounted for and explained.†

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*Lord Lyndhurst.* — This case was heard before Lord Brougham, myself, and other noble lords. The facts of the case are shortly these : — William Lambton by his will bequeathed to his niece, Susan Lambton, a legacy of 5000*l.* charged with other legacies upon his real estate, which he devised to his brother General Lambton, the father of Susan Lambton. General Lambton by his will,

\* 1 Ves. jun. 257., and 3 Bro. C. C. 192.

† The argument here given consists only of the reasons in the printed cases. The full argument and authorities (to which little was added in the House of Lords) are to be found in the reports of the case in the Court of Chancery. The only material cases cited in addition were *Platt v. Platt*, 3 Sim. 503., *Weall v. Rice*, 2 R. & M. 251.

bequeathed 10,000*l.* to his daughter, Susan Lambton, who after the date of that will married the Respondent, Mr. Wharton. Upon the occasion of her marriage, General Lambton gave a marriage portion of 15,000*l.* to his daughter; and in the instrument executed upon that occasion, it is agreed and declared that the marriage portion was given as satisfaction of all sums to which Susan Lambton was entitled under the will of her uncle, William Lambton. The question is, whether that marriage portion is to be taken as a satisfaction not only of the sum to which she was entitled under the will of her uncle, but also as a satisfaction or ademption of the legacy bequeathed to her by the will of her father — whether in addition to the marriage portion of 15,000*l.* Mrs. Wharton is entitled to the legacy of 10,000*l.* under her father's will.

It appears that General Lambton died in the year 1794, and no claim to this legacy was made until the year 1826, a period of 32 years. It is alleged, on the part of Mr. and Mrs. Wharton, that they were wholly unacquainted with the fact, that any legacy had been bequeathed to Mrs. Wharton, or that she had any claim to any legacy under her father's will. Now it is proved that, immediately after the death of General Lambton, his will was read in Lambton Hall, in the presence of William Henry Lambton, Mrs. Wharton's brother, the sole executor of General Lambton; in the presence of Ralph John Lambton, another of her brothers, and who was one of the trustees of the settlement made upon her marriage; and also in the presence of Dorothy Lambton, her sister, who took a legacy of 10,000*l.* under the will. Under these circumstances it appears to me extraordinary that Mrs. Wharton

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should have had no knowledge of any legacy having been bequeathed to her by her father's will. It is the more extraordinary as, upon a recent occasion, she stated, that she considered herself the favourite child of her father, and thought it probable that she should have a legacy under his will. This would naturally have led her to enquiry; and it appears highly improbable under such circumstances (this family living on good terms together, and Dorothy Lambton herself taking a legacy of 10,000*l.*) that it should never have come to the knowledge of Mrs. Wharton, a sister of the parties, that she had been mentioned in the will, and that a legacy of 10,000*l.* had been bequeathed to her.

But there is some evidence which has been insisted on for the purpose of leading to the conclusion, that, in truth, Mrs. Wharton had no knowledge of this legacy. It appears that Lord Durham was desirous of selling a part of the property on which this legacy was charged, and he entered into a treaty for that purpose with Lord Eldon. Lord Eldon required an indemnity against any claim which might arise to this legacy; in consequence of which, Mr. Ward (who was the solicitor of Lord Durham) waited upon Mr. and Mrs. Wharton, at Morton House, and had a conversation with them on the subject of the legacy, and in the course of that conversation, Mrs. Wharton stated, that she had never heard that she was entitled to a legacy under her father's will. Now this statement of Mrs. Wharton has been insisted upon as evidence in this cause, that Mrs. Wharton was ignorant of the fact in question; but after having considered the point fully, I cannot bring myself to the conclusion that any thing stated by Mrs. Wharton, who

is a claimant and party in the cause, can be made use of as evidence in her favour, although addressed to the agent of Lord Durham, for that is the circumstance which, as it has been argued, makes it evidence. But the fact is immaterial. The declaration of a claimant and party in the cause, to whomsoever made, cannot be received in evidence, nor influence the judgment of the Court, and all the presumptions are most strongly in favour of the conclusion, that it must have been known to Mrs. Wharton at the time or recently after the time of the death of General Lambton, that she had been mentioned in his will, and that a legacy of 10,000*l.* had been bequeathed to her by that will. Whatever inference therefore in point of law can be drawn from the facts as proved, must, in my apprehension, be adverse to the claim of Mr. and Mrs. Wharton.

Another point made in the argument was, that the amount of the two sums given by the wills did not correspond with the portion given by the settlement. The legacy left by William Lambton amounted to 5000*l.*, the legacy bequeathed by General Lambton to Mrs. Wharton amounted to 10,000*l.*, those two sums together making 15,000*l.*; on the other hand, the marriage portion amounted to 15,000*l.* But then it was argued that in addition to the legacy of 5000*l.* there was an arrear of interest due upon it at the time when the marriage portion was given, amounting to upwards of 2000*l.*, so that the sum on the one side would have been in the whole 17,000*l.* and upwards, and the sum on the other side 15,000*l.* Now, assuming those facts to be as it is alleged and argued, still it does not appear to me that they at all affect this case. It is

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not necessary, in order to raise the question of ademption, that the sums should exactly correspond. There are many cases in the books, some of which were cited in the course of the argument at the bar, where the proportional difference was much greater than it is contended that it was in the present case. But in truth there is no evidence in this cause to show that any arrear of interest was due; and after a lapse of 30 years we cannot, under the circumstances of the case, presume that any such arrear existed at the time.

But then it was further argued, that the limitations under the will are widely different from the limitations under the settlement, and that such difference would prevent the application of the principle of ademption to this case; and, indeed, that doctrine was alluded to in the judgment of the Vice-Chancellor; but I apprehend that such a circumstance will not prevent the application of the principle of ademption, and that the authorities are all the other way. In the case of *Trimmer v. Bayne*\*, which was cited in the course of the argument, Lord Eldon expresses himself in these terms: "The Court does not enquire whether the portion by the will is entirely and absolutely to the child; or what is afterwards advanced in this form, a settlement upon marriage, which not being a performance of a covenant or satisfaction of a debt, yet is a presumed satisfaction of the intended portion." And in another case of *Baugh v. Reid*† (which was cited for another purpose), this point having been insisted on in the argument, Lord Thurlow expressed himself in these

\* 7 Ves. 508.

† 3 B. C. C. 191. 1 Ves. jun. 257.

terms: "Upon the marriage of his daughter he transfers part of that specific sum so mentioned. I agree to different uses; yet I doubt whether, though not to the same uses, it will not operate as an ademption, if not a satisfaction, being given as an advancement upon marriage."

But there is a case of *Monck v. Lord Monck*\*, decided by Lord Redesdale, which is directly in point. Lord Redesdale says, "It was pressed upon me by the counsel for the Plaintiff that the variance in the provision by the settlement and the will distinguished this case. That is a circumstance which may avail to prove it not to be in satisfaction of a debt or covenant, but never of a legacy given as a provision. This distinction was taken by Lord Hardwicke in the case of *Clarke v. Sewell*†; and in *Trimmer v. Bayne*, this doctrine is recognised by Lord Eldon, where in he states the question to be whether, the limitations being different, it was an ademption, and lays down this rule, that where a parent or person in *loco parentis* gives a legacy as a portion, and afterwards, upon marriage or any other occasion calling for it, advances in the nature of a portion to that child, that will amount to an ademption of the gift by will; and this Court will presume he meant to satisfy the one by the other."

The same point was expressly decided in *Platt v. Platt*‡ by the present Vice-Chancellor, who observed, "although there is a material difference between the provision made by the will and the provision under the settlement, still the one is a satisfaction of the other." So that the question

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\* 1 Ball &amp; Be. 298.

† 3 Sim. 503.

‡ 3 Atkyns, 98.

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was raised and presented to the mind of the Vice-Chancellor, and the Vice-Chancellor decided in favour of the ademption. I conceive, therefore, that the circumstance of the limitations being different does not in this instance prevent the application of the principle of ademption.

Another point raised was this,—that by the terms of the settlement the 15,000*l.* was to be in satisfaction of all that Mrs. Wharton was entitled to under the will of her uncle William Lambton; and it was therefore contended, that as this provision was stated to be in satisfaction of a debt due by General Lambton, that it could not also be taken to be in satisfaction or ademption of what she otherwise would be entitled to under the will. I have never felt the force of that argument. It was necessary, as far as related to the debt, that the provision in satisfaction of it should be in terms expressed; but as far as related to the provision by the will it was not necessary, because that effect is produced by the operation of law.

But the case of *Baugh v. Read* \* was cited as an authority for this doctrine distinctly in point. That case is reported both in Brown's Reports and in Vesey; the best report is in Vesey. It does not appear however to me, after carefully considering that case, that it supports the position for which it was cited. In that case, by the terms of the will, the legacy given was in satisfaction of a debt due under the settlement made on the marriage of the testator. As far as related to the portion, a portion of 5000*l.*, and in the instrument by which the portion was created, there was a covenant on the part of the daughter, that she would, when she

\* *Antè*, p. 544.

came to the age of twenty-three, assign the sum that she was entitled to under the will of her grandfather. These circumstances are widely different from those of the present case. But it was not with reference to these circumstances, as I collect from the different parts of the report, that Lord Thurlow decided that case; he decided that case with reference to the nature of the fund out of which the legacy was to be paid. That is to be collected from many parts of the report, and is also confirmed by the concluding passage, in which Lord Thurlow says, "it is impossible to say this is either a satisfaction or an ademption. It is not express enough. I think the father intended to give this right to a sum expected to accumulate before his death by the addition of all these sums at least, if not of others; therefore it does not come up to that point which I should have thought it reached," (that was with respect to the ademption,) and perhaps have been wrong in so thinking, if it had been a certain sum distributed in certain proportions." Such are the grounds on which that case was decided. They have no application to the present question.

I have now stated the various objections urged at the bar for the purpose of leading your Lordships to the conclusion that the general rule of ademption could not be applied to the present case. It appears to me that none of them are sufficient for that purpose, and that the general rule of law ought in this instance to prevail.

I am, therefore, of opinion that the judgment ought to be reversed.

Judgment reversed without costs.

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## ENGLAND.

(COURT OF CHANCERY.)

|                           |   |   |                     |
|---------------------------|---|---|---------------------|
| EDWARD OAKELEY,           | - | - | <i>Appellant;</i>   |
| SARAH HAUGHTON PASHELLER, | } | - | <i>Respondents.</i> |
| and others,               |   |   |                     |

In 1810, R. and S., who carried on business in co-partnership under the firm of R. and Co., borrowed of O., the father-in-law of R., 10,000*l.*, for which sum O. accepted four bills drawn by R. and S. in the name of their firm; and to secure the repayment of the monies which should be paid by O. upon the acceptances, R. and S. in 1811 and 1812 executed to O. four joint and several bonds in the penal sums of 5000*l.* each, with conditions to be void, if R. and S., their heirs, &c. should pay to O., his executors, &c. as to two of the bonds on or before the 15th of October 1817, and as to the remaining two of the bonds on or before the 15th of January 1818, all such sums of money as O., his executors, &c. should have paid on account of the bills, with interest, &c. The amount due upon the bills was afterwards paid by O., to whom credit in account for 10,000*l.* was given by R. and S., and the interest paid thereon.

In November 1814. S. died, having made his will and appointed executors. In May 1815, according to a provision in the articles of partnership, the accounts were made up, the stock, &c. valued, and the partnership dissolved, of which notice was given in the London Gazette; and shortly afterwards R. contracted a new partnership with K., another son-in-law of O., which was carried on and continued in the firm of R. and Co.

In June 1815, a deed between the executors of S., and R. and K. his new partner, was executed, by which it was recited that it had been agreed that R. should be entitled to all the outstanding debts and effects of the late firm of R. and S., upon paying to the executors of S. 3085*l.*, and securing the further payment of 49,622*l.* with interest from the 1st of May last, and indemnifying them against all outstanding debts and engagements of the firm specified in a schedule; and thereupon R. covenanted to assign the debts of the old firm to trustees to secure the payment of promissory notes given by R. and K. to the executors of S.; and R. and K. covenanted to execute

and deliver to the executors of S. a bond in the penalty of 150,000*l.* conditioned for the payment of the outstanding debts of the old firm of R. and Co., and to indemnify the executors against all claims. Among the debts contained in the schedule was the one due to O. of 10,000*l.* The sums, as stipulated by the deed, were afterwards paid to the executors, and R. and K. carried on the business in partnership, under the name of the old firm, from that time until 1826, delivering accounts annually to O., in which they credited him with the debt of 10,000*l.*, and paid the interest upon it, with which he was debited in the accounts. These accounts included, also, and without distinction, a loan of 17,000*l.* stock, which had been made by O. to R. and K., with the dividends thereon, and payments made in respect of the dividends.

In 1817 O. agreed with R. and K. to leave the 10,000*l.* in their hands for three years longer. Towards the expiration of this term of three years, O., in a letter dated in 1820, addressed to R. and K., expressed himself as follows: "The bonds of the house which were granted to me in 1811 and 1812, payable in six years, and the payment of which was suspended for three years longer, in consequence of my engagement in 1817, will become due on the 15th of October and 15th January next, at which period I hope it will be convenient to the house to discharge them." Upon application by R. and K. for further time, O., by letter on the 5th October 1820, replied, "that it would not be convenient to him to enter into any new engagement for continuing the advance of 10,000*l.* beyond the term of his former agreement." But upon a renewed application, O., by letter on the 14th October 1820, after noticing a proposal made on behalf of his son (a clerk in the house of R. and K.) says, "I shall be happy to wait twelve months (the time you require) in order to receive such a proposal," &c. It appeared also by the correspondence that the firm of R. and K. were occasionally under pecuniary embarrassment.

In 1823, O. having required further security for his debt, it was suggested by his solicitor that notice should be given to the executors of S.; but upon the representation of R. and K., that such notice would have the effect of bringing an immediate demand upon them, and an opinion given by counsel, that the taking a collateral security from R. and K., provided no further time were given to them, would not discharge the estate of S., the security was effected accordingly on the 18th December 1823, and no notice was given.

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In 1826 R. died, not leaving (as his executors alleged) assets to pay the debt. K. also alleged that he was unable to pay it. Under these circumstances, held, that the estate of S. was discharged.

BY articles of agreement, dated the 1st of January, 1810, George Reid, and the Reverend Philip Castel Sherard, agreed to carry on the business of West India merchants in co-partnership together, under the firm of George Reid and Company, for a term of seven years, determinable on the 1st of May which should next happen after the death of either of the partners during the term; and it was by the articles stipulated that if such event should happen the accounts of the co-partnership business should be made up to that day, and the co-partnership stock and effects should be valued as therein mentioned.

On the 12th of July, 1811, Sir Charles Oakeley, Baronet, who was the father-in-law of George Reid, accepted four bills of exchange for 2500*l.* each, drawn upon him by George Reid and Philip Castel Sherard, under the firm of George Reid and Company, and payable to their order three months after the dates thereof; and for the purpose of securing to Sir Charles Oakeley the repayment of all such sums of money as he should become liable to pay, and should actually pay in respect of the said four bills of exchange, George Reid and Philip Castel Sherard, on the same day, executed to Sir Charles Oakeley four joint and several bonds, in the penal sum of 5000*l.* each, with conditions for making the same void if George Reid and Philip Castel Sherard, their heirs, executors, or administrators, should pay or cause to be paid to Sir Charles

Oakeley, his executors or administrators, as to two of such bonds, on or before the 15th of October, 1817, and as to the other two of such bonds, on or before the 15th of January, 1818, all such sums of money as Sir Charles Oakeley, his executors or administrators, should have paid in honour and discharge, or on account of the said bills of exchange so drawn upon and accepted by him as aforesaid, or in honour and discharge, or on account of any renewed or other bill or bills, note or notes (if any), which should be drawn upon and accepted by Sir Charles Oakeley, at the request or on account of George Reid and Company, in lieu of the said bills of exchange, or any of them, together with interest on such sum or sums of money at the rate of 5 per cent. per annum, to be computed from the respective times of paying the same.

The four bills of exchange were negotiated, and Sir Charles Oakeley paid or satisfied them, as they respectively became due, to the amount in the whole of 10,000*l.*, whereby that sum became due to him from George Reid and P. C. Sherard, upon the security of the bonds, payable at the times therein mentioned, and George Reid and P. C. Sherard gave Sir Charles Oakeley credit in account for the sum of 10,000*l.*, and paid him the interest thereon.

In November, 1814, P. C. Sherard died, having previously made his last will and testament, dated the 24th of August, 1809, and thereby appointed his three brothers therein named executors thereof; but the testator, by two codicils to his will, revoked the appointment of two of his brothers, and appointed his widow, the Respondent, and Sir Simon

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Haughton Clarke, in the stead of two of his said brothers, to be trustees and executors of his will and codicils, together with his brother, the Rev. George Sherard; and the Respondent, and Sir Simon Haughton Clarke, and George Sherard, shortly after the death of the testator, Philip Castel Sherard, proved his will and codicils in the proper Ecclesiastical Court.

George Reid, as the surviving partner of the firm of George Reid and Company, continued to carry on the co-partnership business until the 1st of May, 1815, when, by the articles, the same became determined, notice whereof was published in the London Gazette. Shortly afterwards, and before either of the bonds became payable, George Reid entered into co-partnership in the said business with Roger Kynaston, who was also a son-in-law of Sir Charles Oakeley. The accounts of the co-partnership between George Reid and the testator, Philip Castel Sherard, were, pursuant to the articles of agreement, made up by George Reid to the 1st of May, 1815, and the partnership stock and effects valued in manner prescribed by the articles.

By articles of agreement dated the 8th of June, 1815, and made between George Reid of the first part, the Respondent, then Sarah Haughton Sherard, Sir Simon Haughton Clarke, and George Sherard, as such executors as aforesaid, of the second part, and Roger Kynaston of the third part, after reciting that it had been agreed that the said George Reid should be entitled to all the outstanding debts and effects of the co-partnership of Reid and Company, (except certain debts therein mentioned), upon paying to the Respondent, and

Sir Simon Haughton Clarke and George Sherard, as the executors of Philip Castel Sherard, the sum of 3805*l.* 5*s.* 8*d.*, and securing to them the sum of 49,622*l.* 16*s.* 6*d.*, with interest from the 1st of May then last, and indemnifying the said executors from all the outstanding debts and engagements of the co-partnership specified in the first schedule thereunder written, by the joint and several bonds of George Reid and Roger Kynaston, in the penalty of 150,000*l.*: It was witnessed that George Reid did thereby covenant and agree with the Respondent, and Sir Simon Haughton Clarke and George Sherard, that he would, as soon as conveniently might be, assign, transfer, and set over all the debts specified in the second schedule to the said agreement, unto two trustees, to be named by both parties as therein mentioned, for securing the payment of the promissory notes therein mentioned to be given by George Reid and Roger Kynaston, for the payment so to be made to the Respondent, and Sir Simon Haughton Clarke and George Sherard, as such executors as aforesaid, and after payment thereof, in trust for George Reid, his executors, administrators, and assigns; and George Reid and Roger Kynaston did thereby covenant and agree with the Respondent, and Sir Simon Haughton Clarke and George Sherard, as such executors, that they would, after the execution of the said agreement, execute and deliver to the Respondent, and Sir Simon Haughton Clarke and George Sherard, as such executors, a good and sufficient bond in the penalty of 150,000*l.*, conditioned for the payment and satisfaction of the outstanding debts and engagements of the co-part-

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nership of Reid and Company, specified in the first schedule to the agreement, and also against all debts due in respect to the ships belonging to the co-partnership, and for indemnifying the Respondent, and Sir Simon Haughton Clarke and George Sherard, as such executors, against all claims in respect thereof.

The first schedule to the agreement contained, amongst other particulars, the following entry, "Sir C. Oakly, 10,000*l*."

The promissory notes agreed to be given by George Reid and Roger Kynaston were accordingly given, and afterwards paid and satisfied, but the bond of indemnity from George Reid and Roger Kynaston was never given to the executors of Philip Castel Sherard, nor was any other instrument prepared or executed in pursuance of the provisions of the agreement.

George Reid and Roger Kynaston continued the business under the same firm of George Reid and Company, in partnership together, until the year 1826, when George Reid died. They adopted the debt of 10,000*l*. due to Sir Charles Oakeley (which they had by the last mentioned articles of agreement undertaken to bear), and gave Sir Charles Oakeley credit for it in account, and paid him interest thereon.

Sir Charles Oakeley was in frequent communication with George Reid and Roger Kynaston, and his son the Appellant, Edward Oakeley, was a clerk in their house. Annual accounts were made out by George Reid and Roger Kynaston, and transmitted to Sir Charles Oakeley, in which he was credited with the sum of 10,000*l*., and the

interest thereon, and debited with payments which they made for the interest. He accommodated them with a further loan of about 17,000*l.* stock, and the same annual accounts comprised this sum and the dividends which became due to him in respect thereof, and the payments which they made for such dividends.

In October, 1817, John Pasheller and the Respondent intermarried.

In the year 1818 George Sherard died, leaving the Respondent and Sir Simon Haughton Clarke, his co-executors, him surviving.

In the year 1815 a suit in Chancery (*Sherard v. Sherard*,) was instituted by some of the legatees of Philip Castel Sherard, against his representatives for the administration of his estate, and on the 26th of February, 1818, a decree was pronounced in that suit, referring it to the Master to take the usual accounts of his assets and of his debts; and advertisements were published in the usual manner, calling upon his creditors to come in and prove their debts under the decree.

In the year 1817 some arrangement, or understanding, took place or was proposed between Sir Charles Oakeley, and George Reid and Roger Kynaston, with reference to the Appellant becoming a partner in, or forming some other connexion with their house of business. The particulars of this arrangement appear only from occasional passages in the correspondence. It appears also from the correspondence, that about the same time Sir Charles Oakeley agreed with George Reid and Roger Kynaston, or engaged and consented, at their request, to allow the sum of 10,000*l.* to re-

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main in their hands, and not to call on them for payment thereof for a period of three years. This agreement or engagement was not communicated or known to the executors of Philip Castel Sherard.

Towards the expiration of this term of three years, Sir Charles Oakeley, in a letter to Roger Kynaston, dated the 18th of September, 1820, expressed himself as follows: "The bonds of the house which were granted to me in 1811 and 12, payable in six years, and the payment of which was suspended for three years longer, in consequence of my engagement in 1817, will become due on the 15th of October and 15th January next, at which period I hope it will be convenient to the house to discharge them."

Roger Kynaston, on behalf of himself and George Reid, requested Sir Charles Oakeley to allow the sum of 10,000*l.* to remain longer in their hands; and he at first declined so to do, and in a letter to Roger Kynaston, dated the 5th of October, 1820, after mentioning to the effect that he was desirous of placing his property on real or Government securities, he expressed himself with reference to the sum of 10,000*l.* as follows: "Under the circumstances above stated, I must candidly confess to you that it would not be convenient to me to enter into any new engagements for continuing the advance of 10,000*l.* beyond the term of my former agreement."

Further applications were made by Roger Kynaston, on behalf of himself and George Reid, to Sir Charles Oakeley, and he proposed or suggested some arrangement for the benefit or advancement of the Appellant, and with reference thereto, requested

Sir Charles Oakeley to allow further time for payment of this sum of money ; and he consented thereto, and in a letter to Roger Kynaston, dated the 14th of October, 1820, he expressed himself as follows : “ I expressed in my last letter that it “ would not be convenient to me to enter into any “ new engagements for continuing my advance ; “ but this arose from the circumstances explained “ in the former part of my letter, and not from any “ desire to subject the house to the smallest inconvenience, or a wish to receive payment of my “ loan without waiting any further proposal on “ Edward’s behalf. On the contrary, I shall be “ happy to wait twelve months (the time you require), in order to receive such a proposal, trusting it will be of a nature calculated as much as “ possible to meet the wishes I have communicated “ respecting the final arrangement of my pecuniary “ concerns.”

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Other letters and communications passed from time to time between Sir Charles Oakeley, and George Reid and Roger Kynaston, in which the sum of 10,000*l.* was mentioned and referred to ; and in such letters and communications the sum was treated and spoken of as being in the hands of George Reid and Roger Kynaston, and as a loan to them, and as being due from them to Sir Charles Oakeley.

The correspondence between Sir Charles Oakeley and Roger Kynaston contained many intimations, on the part of the latter, showing that the partnership of George Reid and Roger Kynaston was occasionally under some degree of pecuniary embarrassment.

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It appears that in the year 1823, Sir Charles Oakeley having pressed George Reid and Roger Kynaston to give him some security for the sum of 10,000*l.*, it was proposed and arranged that they should for that purpose assign to him certain policies of insurance, and a draft of the proposed assignment was prepared. Mr. Burfoot was on that occasion the solicitor of Sir Charles Oakeley, and not being aware of the engagements entered into for continuing the loan to George Reid and Roger Kynaston, and therefore supposing that the estate of Philip Castel Sherard was still liable on the bonds, Mr. Burfoot proposed that such intended security should be communicated to the executors of Philip Castel Sherard, and that they should be requested to assent thereto, in order that the estate of Philip Castel Sherard might not be discharged from the bonds. George Reid and Roger Kynaston, or their solicitor on their behalf, thereupon represented that, if such proposed security were communicated to the executors of Philip Castel Sherard, they would call upon George Reid and Roger Kynaston to pay the bonds, and indemnify the estate of Philip Castel Sherard therefrom, and requested that the proposed security might not be communicated to the executors; and Sir Charles Oakeley being desirous of accommodating George Reid and Roger Kynaston, and of preventing them from being called on by the executors of Philip Castel Sherard to pay the bonds, consented to such request; and Mr. Burfoot, as Sir Charles Oakeley's solicitor, consulted with counsel about the mode in which such security could be framed, without discharging the estate of Sherard.

This transaction appears in a letter from Mr. Burfoot to Sir Charles Oakeley, dated the 18th of December, 1823, where it is said, that "As to the assignment of the policies, and giving notice to Mr. Sherard's executors, some difficulties had arisen," &c.; that the solicitor of Reid and Company had objected to applying to Mr. Sherard's executors for their consent to taking the collateral security, inasmuch as that would have the effect of their insisting on Messrs. Reid and Company immediately discharging the bonds, which would not be convenient for them to do," &c.; that a different mode of proceeding had been proposed; and he submitted that taking a collateral security from one of the obligors would not discharge the estate of the other."

Sir Charles Oakeley having received this letter, in answer thereto says, "With respect to the application to Mr. Sherard's executors, I am certainly not disposed to take any step which might embarrass the house; and I am glad to find that my abstaining from the application at this time, will not affect any claim on the executors, since there is no stipulation in the bonds for postponing payment to a future day."

An assignment was accordingly executed, bearing date the 18th of December, 1823, and made between George Reid and Roger Kynaston, of the first part, Sir Charles Oakeley, of the second part, and Edward Oakeley (the Appellant) of the third part: it recited (amongst other things) that there was then due and owing to the said Sir Charles Oakeley, on the said bonds, the principal sum of 10,000*l.*, all interest having been paid up to the

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date thereof: And that Philip Castel Sherard had died, and that George Reid had subsequently formed a partnership with Roger Kynaston, under the firm of George Reid and Company; and that such last-mentioned partnership had, since its formation, as between themselves and the executors of Philip Castel Sherard, assumed the debt of 10,000*l.*, and paid the interest of the same to Sir Charles Oakeley, but that Sir Charles Oakeley had not in any manner discharged the estate of Philip Castel Sherard from the payment of the several sums secured by the bonds; and that, in order collaterally and further to secure the payment of the principal sum of 10,000*l.*, and interest thereafter to grow due in respect of the same, but expressly without prejudice to the four several bonds, or to any remedies which Sir Charles Oakeley might possess against either of the parties sealing the same, or against their estates, and in particular against the estate of Philip Castel Sherard, George Reid and Roger Kynaston had agreed to assign to Edward Oakeley, his executors, administrators, and assigns, the benefit of the policies of insurance therein mentioned; and George Reid and Roger Kynaston thereby assigned to Edward Oakeley, his executors, administrators, and assigns, several policies of insurance therein mentioned to have been effected on the life of Horace William Beckford, for sums making together 10,000*l.* and the benefit thereof, upon the trusts therein mentioned, for further and collaterally securing the sum of 10,000*l.* therein mentioned to be due on the said bonds: And George Reid and Roger Kynaston thereby jointly and severally covenanted for the payment of the said sum of 10,000*l.* and interest.

This indenture, and the treaty and arrangement about the same, were not communicated to the representatives of Philip Castel Sherard.

In the year 1826, George Reid died, having appointed J. E. Hammet, and the Appellant and William Oakeley, executors of his will, who duly proved the same; but, as they alleged, his assets were insufficient for the payment of his debts. The interest on the sum of 10,000*l.* was paid by George Reid and Roger Kynaston till the death of George Reid, and afterwards Roger Kynaston for some time continued the payment. His affairs by degrees became more embarrassed, and by his answer in this cause he stated himself to be unable to pay the debt.

By indenture dated the 5th day of September, 1826, Sir Charles Oakeley, for the purpose of making some family arrangements, assigned and transferred (amongst other property) the said four several bonds unto his sons the Appellant and William Oakeley, and the Defendant Thomas Hinckley, and granted to them the usual powers and authorities for recovering and receiving the same: shortly after the execution of the indenture Sir Charles Oakeley died, having made and executed his last will and testament in writing, and appointed his sons and Thomas Hinckley, executors thereof, who proved the same in the proper Ecclesiastical Court.

In May, 1827, Sir Simon Haughton Clarke received a letter from Thomas Hinckley, intimating that the trustees or executors of Sir Charles Oakeley had found amongst his papers the said four bonds, all interest whereon, it was by the letter

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stated, had regularly been paid to that time; and that so long as the interest continued to be regularly paid the trustees of Sir Charles Oakeley would not probably wish to call in the principal, but that in consequence of the recent death of George Reid, they deemed it proper to apprise the representatives of Philip Castel Sherard of their liability.

In January, 1829, the Appellant, and William Oakeley and Thomas Hinckley, brought a state of facts and charge into the Master's office, under the decree in the suit of *Sherard v. Sherard*, whereby they claimed the sum of 10,000*l.*, with interest thereon from the 1st of November, 1828, as a debt due to them from the estate of Philip Castel Sherard, by virtue of the four bonds. The proceedings upon this state of facts and charge were suspended in consequence of the suit next hereinafter mentioned, and to await the decision thereof.

On the 16th of April, 1829, the Respondent and her husband, and Sir Simon Haughton Clarke, exhibited their bill in the Court of Chancery against James Esdaile Hammet, the Appellant, and William Oakeley, Thomas Hinckley, and Roger Kynaston, which bill was afterwards amended; and the amended bill, after stating (amongst other things) to the purport or effect hereinbefore stated, prayed that it might be declared by the Court that the estate of the testator, Philip Castel Sherard, was discharged and exonerated from the payment of all sums of money due and to become due, or alleged to be due in respect of the bonds, or either of them: and that the Defendants, the Appellant, and William Oakeley and Thomas Hinckley, might be restrained as well by the *interim* as by the perpetual order and

injunction of the Court, from taking any proceeding or proceedings to obtain payment of the sums due or to become due in respect of the four several bonds, or either of them, out of the assets of the testator, Philip Castel Sherard ; and that, if necessary, the said bonds might be delivered up to the Plaintiffs to be cancelled ; or in case the Court should be of opinion that the estate of the testator, Philip Castel Sherard, was not so discharged, then that the Defendants, the Appellant, and William Oakeley and James Esdaile Hammet, as the executors of George Reid, and the Defendant Roger Kynaston, might be decreed to take up and pay the said several bonds, or so much as might be due thereon, and to exonerate and indemnify the estate of Philip Castel Sherard from the payment thereof : and to pay to the Plaintiffs what, if any thing, they might be compelled to pay out of the assets of Philip Castel Sherard, in respect of the said bonds, together with all costs, charges, and expenses which had been or might be incurred by the Plaintiffs in respect of the said bonds : and that it might in that case also be declared, that the Plaintiffs had a lien upon the said policies of insurance, for indemnifying them against the said bonds : and that the said policies of insurance might, if necessary, be sold, and that the proceeds thereof might be applied in payment of what, if any thing, was due upon the said bonds, or to indemnify the Plaintiffs against the said bonds, and such costs, charges, and expenses as aforesaid ; or that the said policies of insurance, and the benefit of the said indenture of the 17th of December, 1823, might be assigned to them, and that they might be at liberty to com-

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mence such proceedings as they might be advised, upon the covenants therein contained, against the estate of George Reid, and against Roger Kynaston, in the names of the other Defendants, the Appellant, and William Oakeley and Thomas Hinckley.

The several Defendants appeared to the bill, and put in their answers thereto. The answers were replied to, and the cause being at issue, the parties entered into admissions, and agreed that certain documents and facts should, at the hearing, be considered and treated as proved in the cause. These admissions comprised numerous letters which passed in a correspondence between Kynaston as partner in the house of Reid and Co., Sir Charles Oakeley, and Burfoot his solicitor, relating to the question as to the loan raised in the pleadings, and extending from 1819 to 1823.

The following are letters and extracts from some of the letters bearing most materially upon the points in question :

“ *Lichfield, Sept. 18th, 1820.*

“ My dear Friend,

“ I thank you for your letter of the 15th, which  
 “ contains all that I could wish, at present, re-  
 “ specting Edward (the Appellant). I am fully  
 “ aware of your good dispositions towards him, but  
 “ not at all anxious that any thing should be done  
 “ to advance his interests before the time when  
 “ your own views and circumstances may perfectly  
 “ accord with your inclinations in his favour; in  
 “ the meanwhile it will afford him great pleasure to  
 “ continue his service on the terms you mention.

“ The bonds of the house, which were granted  
 “ to me in 1811 and 1812, payable in six years,  
 “ and the payment of which was suspended for  
 “ three years longer in consequence of my engage-  
 “ ment in 1817, will become due on the 15th  
 “ October and 15th January next, at which periods  
 “ I hope it will be convenient to the house to dis-  
 “ charge them.

“ I am always, most affectionately, yours,

“ CHA'. OAKELEY.”

“ Roger Kynaston.”

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“ *Lichfield, October 5th, 1820.*

“ My dear Friend,

“ You will recollect, that in my communication  
 “ to you in April last, as well as in my letter of  
 “ the 11th September, I adverted to the particular  
 “ circumstances which called upon me to draw in  
 “ all my concerns with as little delay as possible.  
 “ This call arises from the advanced age at which  
 “ I am now arrived, and the necessity I feel of  
 “ placing what property I have upon real or Go-  
 “ vernment securities, so that it might become  
 “ available at my decease, without loss of time. It  
 “ was on this account that I proposed the continu-  
 “ ance of Edward's services, simply on the ground  
 “ of mutual convenience, supposing the long em-  
 “ ployment he had had might render his assistance  
 “ useful, and requiring only such a salary as might  
 “ afford him a just and reasonable compensation  
 “ for his trouble.

“ Under the circumstances above stated, I must

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“ candidly confess to you that it would not be convenient to me to enter into any new engagements for continuing the advance of 10,000*l.* beyond the term of my former agreement.

“ I am always, yours affectionately,

“ CHA<sup>s</sup>. OAKELEY.

“ Roger Kynaston, Esquire.”

“ *Lichfield, October 14th, 1820.*

“ My dear Friend,

“ I am truly sorry that my letter of the 5th instant has given to the house any cause of dissatisfaction whatever; nothing, certainly, could be further from my intention, since it has been my invariable study through life to act with the utmost regard to fairness and consistency in all my transactions.

“ I was well aware that it could not be expected in the ordinary course of events, that Edward should advance in his profession without a sum of money at his command. It was on this account that I regretted my inability to assist him in the way I wished, or to the extent which might be deemed necessary; and I confined my views for the present, therefore, to his continuance in employment upon such a footing as might enable him to live with comfort upon the fruits of his own labour.

“ What may be the value of his services I do not pretend to judge; if what he now receives is more than he is justly entitled to from his standing and experience, or the duties he has to

“ perform, it would be unreasonable to expect it;  
 “ and what is unreasonable could not be at all  
 “ satisfactory to myself. All I can say is, that his  
 “ necessary expenses upon an average of the last  
 “ three years (and no young man can be more  
 “ prudent) has been more than 240*l.* per ann.

“ I expressed in my last letter that it would not  
 “ be convenient to me to enter into any new en-  
 “ gagements for continuing my advance; but this  
 “ arose from the circumstances explained in the  
 “ former part of my letter, and not from any de-  
 “ sire to subject the house to the smallest incon-  
 “ venience, or wish to receive payment of my loan  
 “ without waiting any farther proposal in Edward’s  
 “ behalf. On the contrary, I shall be happy to  
 “ wait twelve months (the time you require) in  
 “ order to receive such a proposal, trusting it will  
 “ be of a nature calculated as much as possible  
 “ to meet the wishes I have communicated re-  
 “ specting the final arrangement of my pecuniary  
 “ concerns.

“ With regard to my son William, as his cove-  
 “ nants will expire in June next, and as I am fully  
 “ aware of the impracticability of advancing the  
 “ interests of two sons in the mercantile line, I  
 “ shall endeavour to procure for him some other  
 “ employment.

“ I am ever yours most affectionately,

“ CHA<sup>s</sup>. OAKELEY.

“ Roger Kynaston, Esquire.”

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*“ Lichfield, January 24th, 1821.*

“ My dear Friend,

“ You have not wanted proofs of my disposition  
 “ to accommodate both yourself and the house,  
 “ and it would afford me particular satisfaction to  
 “ meet your wishes on the present occasion to the  
 “ fullest extent, if I were not under considerable  
 “ embarrassment myself, in consequence of the  
 “ large portion of my property now locked up,  
 “ and the very heavy advances which I have been  
 “ obliged to make from time to time, for the relief  
 “ of my son Charles, whose imprudence has already  
 “ cost me about 20,000*l.*, and subjected me to still  
 “ further engagements on his account : under these  
 “ circumstances, I am, in truth, so straitened, that  
 “ I cannot, however anxious, assist the concern  
 “ in any other way than by allowing some further  
 “ time for the payment of their bonds, under such  
 “ an arrangement as must necessarily take place in  
 “ the course of a few months, when my son Wil-  
 “ liam’s time expires. I was in hopes that it might  
 “ have suited the inclinations of both my sons to  
 “ continue in the mercantile line, but William’s  
 “ mind appears so decidedly against it, that I must  
 “ endeavour to fix him in some other employment  
 “ as soon as his term of service is at an end.

“ My son Herbert speaks highly of his young  
 “ namesake’s qualification, and thinks he will make  
 “ a figure at Westminster. I am, with kindest love  
 “ to all your family,

“ My dear friend, yours most affectionately,

“ CHA<sup>s</sup>. OAKELEY.

“ R. Kynaston, Esq.”

" *March 28th, 1821.*

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" My dear friend,

" I sincerely congratulate you upon the favourable issue of your cause. Relying upon your assurance that no call will be made upon me for payment of the bills you wish me to accept for 5000*l.*, at four months after date, I will cheerfully comply with your request; but as the little money I have now at command is destined for another purpose connected with my will, it would be highly imprudent in me to give such an acceptance under the possibility of disappointment in my expectations.

" My anxiety to close the concerns which I have at present outstanding daily increases, as William's engagement is on the eve of expiration, and Edward's very nearly terminated. I wish to hear from you on the subject of the advances on their account, and the proposals you may have made respecting Edward, so you will probably by this time have been able to give your attention to these points.

" Amelia is still with Mr. Blandy, but we expect her and the two boys in a few days. I am quite delighted to hear such good account of Charles, to whom I send my blessing.

" I am ever yours affectionately,

" CHA<sup>s</sup>. OAKELEY.

" Roger Kynaston, Esq."

To the last letter, Kynaston, in a postscript, replies :

" P. S. I hope in a few days to write to you respecting Edward; our minds are completely made up as regards him, but I should like to

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“ have a little conversation with him previously to  
 “ my communicating with you. I shall be anxious  
 “ to hear when any thing turns up for William.”

In a letter to Kynaston, dated February 13. 1822,  
 Sir C. Oakeley says,

“ Being anxious, as you know, to meet your  
 “ wishes on every occasion to the utmost of my  
 “ power, I readily consent to what you propose.  
 “ With respect to my own claims upon the house,  
 “ I shall not touch on them at present, but trust  
 “ as soon as Mr. Reid returns from Jamaica this  
 “ point will receive the earliest consideration, with  
 “ a view to a settlement of the account.”

In a letter to Kynaston, dated December 26. 1822,  
 he says, “ From the account you give of the dis-  
 “ appointments and losses which the house has al-  
 “ ready experienced, and of the unpropitious state  
 “ of West India concerns in general, I am led to  
 “ apprehend disappointment myself, and that at a  
 “ period of life when I shall be least capable of  
 “ surmounting it; under this impression I feel  
 “ confident, however, that the house is fully dis-  
 “ posed to secure me as far as their means will  
 “ permit, and that if they see no very near prospect  
 “ of reducing my claim, some assignment and sti-  
 “ pulations like those which I received from Mr.  
 “ Reid, may be granted for my satisfaction.”

In a letter to Kynaston, dated January 1. 1823,  
 he says, “ I never entertained a doubt of the ulti-  
 “ mate security of my claims on the house; but from  
 “ the account you gave me of the heavy loss sus-  
 “ tained by Mr. Wildman’s failure, and the depressed  
 “ state of West India concerns in general, I saw  
 “ little probability of your being able for some  
 “ time to clear my account. I felt anxious, there-

“ fore, to obtain such a provision as might secure  
 “ the gradual payment by instalments; and this  
 “ kind of provision I certainly thought it might  
 “ not be inconvenient to the house to give. For  
 “ the reasons you assign I am perfectly content to  
 “ wait Mr. Reid’s arrival for the further consider-  
 “ ation of the subject; and upon this understanding  
 “ I shall, with great pleasure, renew my acceptance  
 “ for another year.

“ I trust, from the proofs I have already given,  
 “ that you are well apprised of my disposition to  
 “ accommodate the house as far as my own cir-  
 “ cumstances will permit.”

The next letter from Sir Charles Oakeley, ma-  
 terially bearing upon the points in issue, is as  
 follows:

“ *Lichfield, July 24. 1823.*

“ My dear friend,

“ I am happy to hear that Reid is returned safe  
 “ and in good health, and trust his arrival will  
 “ enable you soon to accomplish your wish of  
 “ visiting the Continent.

“ As your departure must now be near at hand,  
 “ I am anxious to bespeak your earliest attention  
 “ to my claims on the house, and to propose some-  
 “ thing on my own part in order to facilitate a set-  
 “ tlement which may correspond, as far as circum-  
 “ stances will permit, with the views I have already  
 “ explained to you.

“ I am sorry to learn from Edward (to whom  
 “ you referred me for information respecting the  
 “ affairs of the house) that your situation at present  
 “ will not allow of any very early payment of my  
 “ loans. Under these circumstances it becomes

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“indispensably necessary, on behalf of my family,  
 “that I should take the best security that the  
 “house can provide for me; and this caution, in-  
 “deed, seemed so reasonable to yourself, that in  
 “your letter of the 29th December last you ob-  
 “serve, that ‘you can have no objection to join in  
 “the assignment to me of any of the securities  
 “which the house possesses.’ I learn from Edward  
 “that you have policies of insurance to offer for  
 “10,000*l.*, which I am willing to take as a security  
 “for my first loan to that amount in 1811. For  
 “the other loan of 17,096*l.* 5*s.* 8*d.* 3 per cent.  
 “stock, I am willing to allow time for replacing  
 “this stock by annual instalments.

“I trust that what I have now proposed will  
 “appear reasonable as well as convenient to the  
 “house, and that at no distant period we shall  
 “mutually feel the gratification of an entire dis-  
 “charge of these claims.

“I am with the most fervent wishes for your  
 “health and happiness, and love to all the dear  
 “children,

“My dear friend, your most affectionately,

“CHA’. OAKELEY.

“Roger Kynaston, Esq.”

In a letter to Sir Charles Oakeley from Burfoot  
 his solicitor, he says, “I have obtained the four  
 “bonds from Messrs. Goslings and Co., which I  
 “find are executed by Mr. Reid and Mr. P. C.  
 “Sherard, who jointly and severally engage to in-  
 “demnify you against certain bills you had ac-  
 “cepted for George Reid and Co. I suppose that  
 “you paid the bills, and that the principal sum of  
 “10,000*l.* is now due to you upon them. Is it

“ your intention to give up your claim upon Mr. Sherard, or his estate, by virtue of the bonds? “ If not I must advise with my conveyancer how “ far taking another security from his co-obligor “ will have the effect of releasing him, Mr. S., or “ rather his estate.”

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To this Sir Charles Oakeley, in reply, says :

“ *Lichfield, Aug. 13th, 1823.*

“ I always considered Reid and Sherard jointly “ and severally responsible for the bills amounting “ to 10,000*l.* which I had paid; but, thinking myself “ quite secure without calling upon Mr. Sherard’s “ executors after his death, I have yet taken no “ steps for that purpose. Whether anything can “ now be obtained from Mr. Sherard’s estate, by “ virtue of the bonds, you can perhaps easily ascertain. But the matter seems more immediately “ to concern his co-obligor, Mr. Reid, who has “ undertaken for the security of the whole demand.”

In a letter from Mr. Burfoot to Sir C. Oakeley, dated the 8th November, 1823, he says, “ I think “ that it will be advisable, if you mean not to discharge the estate of Mr. Sherard from the liability to pay the bonds, to procure his executors’ “ assent to your taking the proposed security, to “ which they cannot object, as it is for their benefit, “ and I will apply to them for the purpose, on receiving your sanction.”

This letter was indorsed thus, “ 1823. Burfoot, “ 8th Nov. Advises an immediate call on Mr. “ Sherard’s executors, in consequence of the liabi-

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“ lity of Mr. Sherard to the payment of the joint  
 “ and several bond of himself and Mr. Reid.

“ If such a notice is necessary for my security,  
 “ it should, I apprehend, be made in time, and  
 “ before the trust expires. The house can have  
 “ no wish injurious to my real interest, in an affair  
 “ of such moment.”

Sir C. Oakeley in answer, says, “ You have my  
 “ sanction for the application you propose making  
 “ to the executors of the late Mr. Sherard.

“ Would it not be proper to fix a period of three  
 “ or five years, at most, for the payments for the  
 “ bonds, in order that you might have recourse to  
 “ Mr. Sherard’s estate if the proposed security  
 “ fails?”

In a letter dated 18th of December, 1823, from  
 the house of Burfoot to Sir C. Oakeley, they say,  
 “ As to the assignment of the policies, and giving  
 “ notice to Mr. Sherard’s executors, some difficul-  
 “ ties have arisen : when the draft assignment was  
 “ sent to Mr. Le Blanc for perusal, on the part of  
 “ Messrs. Reid and Co., he informed us that they  
 “ had already assigned the debt due from Mr.  
 “ Beckford to Messrs. Woodbridge, Dyer, and Co.  
 “ as a running security for certain advances ; con-  
 “ sequently that they could not assign any portion  
 “ of that debt, as we had proposed, but only the  
 “ policies to you, and he objected to applying to  
 “ Mr. Sherard’s executors for their consent to tak-  
 “ ing the collateral security, inasmuch as that would  
 “ have the effect of their insisting on Messrs. Reid  
 “ and Co. immediately discharging the bonds, which  
 “ would not be convenient for them to do ; and he  
 “ submitted that taking a collateral security from  
 “ one of the obligors would not discharge the estate

“ of the other. Upon this latter point we have seen  
 “ Mr. Preston this morning, who considers that  
 “ provided no time be given for the payment, that  
 “ is, that the payment is not by express words in  
 “ the deed postponed to a future day, it will not  
 “ operate as a discharge to Mr. Sherard’s estate.”

In a letter dated December 20. 1823, from Sir C. Oakeley to Messrs. Burfoot, he says, “ With respect to the application to Mr. Sherard’s executors, I am certainly not disposed to take any step that might embarrass the house, and I am glad to find that my abstaining from the application at this time will not affect my claim on the executors, since there is no stipulation in the bonds for postponing payment to a future day.”

The admissions also comprised the accounts delivered by Reid and Co. to Sir Charles Oakeley, and the bond from Reid and Sherard to Sir Charles Oakeley, the agreement of 1815, between Reid and Kynaston and the executors of Sherard, the assignment of 1823, from Reid and Kynaston to Sir Charles Oakeley, of the policies and the indenture of 1823, by which the collateral security was given by Reid and Kynaston, to Sir Charles Oakeley.\* The correspondence proved that time for payment of the debt was given by Sir Charles Oakeley to Reid and Kynaston; the debt was therein generally spoken of as a debt of that firm; and upon the transaction for further security, it appeared, that upon a suggestion that notice should be given to Sherard’s executors, and Reid and Kynaston objecting to this, because it would

\* The deeds, letters, and accounts being very long and numerous, the effect of them only is given above. They are contained in an appendix to the Respondents’ case.

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bring a demand upon them, the assignment of 1823 was executed without such notice. The accounts were rendered annually by and in the name of the firm to Sir Charles Oakeley, and comprised a debt of 17,000*l.* stock advanced to them by Sir Charles Oakeley, crediting him with the principal and interest upon both debts, and debiting him with interest paid upon both without distinction.

On the 13th June, 1832, the cause came on to be heard before his Honor the Master of the Rolls, when, after hearing the arguments and proofs, his Honor declared that the estate of Philip Castel Sherard was discharged and exonerated from the payment of all sums of money due and to become due, or alleged to be due in respect of the four several bonds, bearing date respectively the 12th of July, 1811, or any or either of them; and that the Appellant and Thomas Hinckley should be restrained by the perpetual injunction of the Court from taking proceedings either at law or in equity to obtain payment for the sums due or to become due in respect of the said four several bonds, or any or either of them, out of the assets of the testator, Philip Castel Sherard; and his Honor did not think fit to give costs on either side.\*

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\* The judicial argument was as follows :—

*The Master of the Rolls* :— If at the time of the transaction of 1823 the estate of Mr. Sherard remained liable to the estate of Sir Charles Oakeley upon the bond, I am of opinion, contrary to the ingenious arguments that have just been addressed to me, that the estate of Sherard is not discharged by that transaction.

The principle upon which the creditor releases the surety by giving time to the person who by contract between the two payees has become the principal debtor, and the other party contracting has become a surety, the principle upon which the creditor releases the surety by dealing with such principal is not with regard to the interest of the surety, but it is with

After the hearing of the cause Sir Simon Haughton Clarke died.

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regard to the interest of the principal debtor who is so dealt with, because if after releasing or giving time to the person who is the real principal debtor, then the creditor should proceed against the surety, the surety paying the demand has a right to proceed against that principal debtor who is released or to whom time is given so as to defeat altogether the benefit of that indulgence which this arrangement with the creditor has afforded him; that that is the true principle, is not only apparent upon the consideration of the true equities of the case, but is apparent upon the consideration of the case of *exparte Glendinning*. Why should it be, that in this arrangement, if the creditor stipulates with the principal debtor that he will still proceed against the surety, why should it be that in such a case the surety is not released, but because the interest of the principal debtor is that interest which induces the rule? It is perfectly plain therefore that in the transaction of 1823, nothing was done which would have discharged the surety.

Mr. Pemberton urges, and urges truly, that if notice had then been given by the creditors to the executors of Sherard, that it would have relieved them from any demand in respect of this 10,000*l.*, because the other partner was then solvent, and if notice of that demand had been given they might then have proceeded against the other partner to give effect to their demand; that is extremely true, but the creditor was not bound to give such notice to the surety. Supposing that he remained liable, he was not bound to claim against him, and therefore not bound to give notice, and this delaying his claim would not have released the surety. The transaction of 1823 appears to me therefore to be out of the case; but it is not so with respect to the other transactions.

In 1817, Sir Charles Oakeley enters into an agreement with the two persons who had become, as between themselves and the estate of Sherard, the principal debtors; he enters into an arrangement with them to give three years' time for the payment of the demand, and I am of the opinion, to be collected from what I have already stated, that Sir Charles Oakeley could not either proceed within these three years against the principal debtor or against the surety in respect of that demand, and if he could not proceed against either of them in respect of that

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On the 8th of October, 1832, the Appellant and William Oakeley preferred their petition of appeal

demand, then the surety is released ; and the surety is released for this reason ; because whatever the surety pays, he has a right to call on the principal debtor to repay the sum which he has so advanced ; but if there be a delay for three years he may be extremely prejudiced by that delay, because in the *interim* the solvent principal debtor may become an insolvent principal debtor, and then by the act of the creditor the surety would have lost his remedy against the principal debtor.

I am therefore of opinion that the giving the time for three years in 1817 did discharge the estate of Philip Castel Sherard : I consider that it did discharge him, being of opinion that Sir Charles Oakeley well knew in 1817, that by the arrangement between the two partners Reid and Kynaston, they had become the principal debtors, and Sherard's estate surety only. It appears to me that that conclusion is irresistible from the form of the accounts, and from the letters of Sir Charles Oakeley.

Knowing therefore that Sherard's estate was to be charged as surety only, he enters into an engagement which prevented the demand for three years, and consequently discharges the surety.

The estate of Sherard is discharged from all obligation upon these bonds ; and an injunction must issue to restrain the Defendant from proceeding on these bonds against the executors.

I cannot give costs, because I consider the executors of Mr. Sherard have been guilty of great negligence and inattention : they were not aware of this circumstance by which they were discharged from the payment of this bond ; they ought, if they had used reasonable diligence, to have compelled the payment of this bond : the case, therefore, having arisen from their own negligence, though I am bound to give them relief in consequence of the conduct of Sir Charles Oakeley, I cannot give them the costs.

*Mr. Wigram* : — The executors of Reid are brought here to settle the dispute ; there is another suit depending to administer the estate, in which this question might have been decided.

*The Master of the Rolls* : — I cannot give them their costs ; they ought to have seen to the payment of this demand.

*Mr. Wigram* : — There is a suit pending in which this question might have been settled, without having a new suit for that purpose.

from the decree to the Lord Chancellor, and prayed his Lordship to re-hear the cause.

On the 25th and 26th days of February, 1834, the appeal came on to be heard before the Lord Chancellor; and on the 8th of March following, his Lordship ordered that the decree should be affirmed, without costs.

After the hearing of the petition of appeal, John Pasheller died.

The appeal was from the decree of the 13th of June, 1832, and the order affirming the same.

For the Appellants, Mr. *Wakefield* and Mr. *Simmons*.

The bonds given by Reid and Sherard to Sir Charles Oakeley made them both principal debtors. Upon the death of Sherard, Reid, by agreement with the executors of Sherard, took the debt upon himself; but this transaction could not affect Oakeley; he was no party to that agreement, there is no proof that he had notice of it, and even notice could not operate to release the debt. An extension of time was given by Oakeley, to Reid and Kynaston, for the payment of the debt; but the terms of that arrangement do not appear. If any conjecture is to be made upon the subject, it ought to be presumed that the time was given upon the same terms as in the transaction of 1823, when Kynaston gave a further personal security, and the

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*The Master of the Rolls* : — It was absolutely necessary to come to the Court.

*Mr. Wigram* : — But not to have brought them before the Court.

*The Master of the Rolls* : — Yes, it was necessary, because there was an alternative relief.



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responsibility of the old firm, including Sherard's executors, was expressly reserved. Transactions between debtors cannot alter the situation and rights of the creditor; *Heath v. Percival*\*, *David v. Ellice* †, *Gough v. Davis*. ‡ In 1815, when Reid took upon himself the debts of the firm, Oakeley could not have demanded payment of the bonds. The executors of Sherard, if they desired to obtain a release from Oakeley, should have made him party to the arrangement with Reid. But they are content to take an indemnity from Reid; a fact which of itself imports an acknowledgment of the continuing responsibility of the estate to the demands of the creditors of their testator. A large sum being due from Reid to the estate of Sherard, they secure the payment by a transaction which tends to prevent sudden demands by the creditors of the firm, and they withdraw assets from the surviving partner with which he might have paid the debt upon the bonds. They had in their hands partnership assets, out of which the debt ought to have been paid; *Rees v. Berrington*. § If those assets had remained under the controul of the surviving partner, the necessity of asking the indulgence of further time for payment would never have arisen.

A creditor may agree to release one of two joint and several debtors; but there must be evidence of such agreement. There is no such evidence, directly or indirectly. The accounts cannot shew this; they could only raise by inference a debt by simple contract; can it be contended that this is a substitute for a bond debt? The payment and

\* 1 P. W. 682.

† 5 B. & C. 196.

‡ 4 Price, 200.

§ 2 Ves. jun. 542.

receipt of interest could not operate as a discharge; *Daniel v. Cross*.<sup>\*</sup> In *Heath v. Percival* the interest was altered from 5 to 6 per cent. In all other respects it is precisely the present case; *Thomson v. Percival*<sup>†</sup>; *Kirwan v. Kirwan*.<sup>‡</sup>

The bonds were not payable until three years after the death of Sherard. The interest was paid during that time by one of the principal debtors, and the accounts after his death were made up and transmitted in the same form as before.

*Lord Lyndhurst*. — In those accounts the money which he lent to the new firm was blended with the old debt; a circumstance on which the Respondents rely.

For the Appellant. — Not till 1823. There is no direct agreement in evidence, nor any thing in the mode of dealing between the parties to apprize the creditor that there was to be a change of security. There was nothing in the form of the accounts to excite the creditor to inquiry.

As for the argument that the principal debtor was converted into a surety, it is difficult to deal with or to apprehend it. How can an obligor become surety for his own debt? As soon as the acceptances were paid by Oakeley, the joint and several debt upon the bonds took effect. It is argued, that being indemnity bonds payment ought to have been demanded: but money bonds have equally a time of payment fixed. It is the duty of the obligor, not the obligee, to see to the discharge of the debt by effecting the payment. This should have been done by Sherard's executors; but they remained content with the indemnity of Reid against the responsibility of their estate, which they

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<sup>\*</sup> 3 Ves. 277.    <sup>†</sup> 3 Nev. & M. 167.    <sup>‡</sup> 4 Tyr. 491.

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knew to be continuing, or the indemnity would have been useless.

Even supposing that it were the case of a surety, time was not given so as to discharge the debt. There was no binding agreement. The creditor says in a letter, "that he should be happy to wait "a twelvemonth;" could this have been enforced by any proceeding in equity? If not, there could be no discharge.

It is argued that the conduct of the creditor has operated as a fraud. How is that proposition established? It is not necessary to tell the debtor that his obligation continues. The transactions of Oakeley with the new firm, left the executors of Sherard in possession of all their rights and remedies against them. If the dealings of the parties amount to an extinguishment of the debt, it must be by implied contract. There is none such in this case. The judgment of the Master of the Rolls did not proceed on that ground; but assumed that one of the debtors was converted into a surety, and decided the case upon that principle.\*

For the Respondents, Mr. *Pemberton* and Mr. *Jacob*.

This case falls under the rule of equity which has established the doctrine that if time be given by the creditor to a principal debtor, he releases the surety; or if that proposition were untenable, it is at least a case of fraud in equity where the creditor has so conducted himself as to extinguish his claim against the estate of one of two principal debtors.

In the settlement of accounts between Reid and

\* *Antè*, p. 576.

Sherard's executors, the debts of the firm were undertaken by Reid, and the executors received so much the less, and were indemnified against the debt to Sir C. Oakeley. He must have been aware of that arrangement. Reid was his son in law; Kynaston, the new partner, was also his son in law, and his own son was a clerk in the firm. It might be presumed that he must have had some knowledge of the partnership. But the letter in reply to his solicitor, dated in August 1823, furnishes proof that he was aware of the fact. Speaking of his claim upon the bonds, he there says, "whether  
 "any thing can now be obtained from Sherard's  
 "estate by virtue of the bonds; you can perhaps  
 "easily ascertain. But the matter seems more  
 "immediately to concern his co-obligor, Mr. Reid,  
 "who has undertaken for the security of the whole  
 "demand." The reason of his giving time for payment is obvious from the connection of the parties, as well as the correspondence. He knew that if he pressed Reid for payment, it would bring upon him a demand from Sherard's executors.

That Oakeley had notice, appears not only from the correspondence, but from the transfer of the account, the mode of keeping it, and the payment of interest. In the accounts delivered annually by Reid and Co., the new firm, it is treated as their debt. Those accounts include a debt for 17,000*l.* stock advanced by Oakeley to that firm; no distinction is made, the interest on the 10,000*l.* is paid on the same account and in the same manner as the dividends on the 17,000*l.* Upon the question which arose, whether the 17,000*l.* was to be considered as a stock loan or a cash loan, Sir Charles Oakeley, in the letter of August 1823, treats the

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debt of 10,000*l.* on the same footing as the debt of 17,000*l.* upon the stock loan. He cites these as included in the same account as delivered to him by the firm of Reid and Kynaston, and recognizes them as his debtors in respect of both claims: thus adopting and assenting to the account with the new firm of Reid and Co., which comprised the debt of 10,000*l.* This brings the case within the principle laid down in *Gough v. Davis* \* and *Thomson v. Percival*.†

*Lord Lyndhurst.* — With adoption.

For the Respondent. — The effect of the transfer in account received and not objected to by the creditor, operates as if there had been payment by the old firm, and a new loan to the new firm. This may be gathered from the comments of the Judges upon *David v. Ellice*, in *Thomson v. Percival*, and so from *Gough v. Davis*.

*Lord Lyndhurst.* — The principle of decision might be applicable if the facts were made out.

For the Respondent. — Transfer is the usual mode of payment in commerce; debts are so paid in bankers' books, and the party in favour of whom the transfer is directed, might bring an action against the banker for money received to his use; so an action would lie against the banker upon an account stated, which imports a consideration. The transactions with the executors in this case operate as money paid to Reid and Kynaston by consent of Oakeley; and Oakeley might have maintained a joint action against Reid and Kynaston upon the stated and settled account, which must rest upon consideration; Reid and Kynaston having received the money, would be liable to an action

\* 4 Price, 200.

† 5 B. & Ad. 935.

of assumpsit by Oakeley; this is the effect of the transfer. With this doctrine all the cases concur except some observations in *David v. Ellice*, and there was a failure for want of proof; here credit was given on special grounds, the debt has become that of Reid and Kynaston, by the effect of the transaction and conduct of the parties.

As to the concealment, the reasons were obvious; the new firm were in some degree of pecuniary embarrassment, not insolvency, but such as would have induced the party liable for the debts to take measures for his security. Sir Charles Oakeley, in his letter of the 24th July, 1823, says he is sorry to hear that their situation will not allow of an early payment of the loan. If the executors of Sherard had known of this state of things, they would have taken measures to enforce the payment of the debt; but the arrangement of the new firm is, that they shall not be informed, for that reason, and Oakeley is cognizant of this fact, and colludes with them in the concealment. It is argued that the creditor is not bound to give notice to the surety that the principal debtor is embarrassed: possibly he may not be under such legal obligation, but it may be a circumstance to shew a fraudulent dealing between the creditor and the principal debtor, to the prejudice of the surety: here was a bargain between the debtor and creditor that the transaction should be concealed from the surety; when Oakeley is afterwards about to take a farther security from the new firm, he is advised by the solicitor to give such notice. By a letter to Oakeley, from his solicitor \*, it appears that Reid and Kynaston objected to the application to

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\* *Antè*, p. 573.

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Sherard's executors, for their consent to taking the collateral security, " inasmuch as that would have " the effect of their insisting on Messrs. Reid and " Co. immediately discharging the bonds, which " would not be convenient for them to do;" these are the very words of the letter, and they furnish direct inference of a corrupt bargain between the parties to conceal the transaction from Sherard's executors, and to deprive them of or endanger their remedy against the principal debtors; such a transaction cannot be disregarded in a Court of Equity. That Oakeley on a former occasion agreed with the new firm, to delay the time of payment for three years, cannot be disputed, and the agreement between the executors and Reid that he should pay the debt.

*Lord Lyndhurst.*—How will an arrangement between debtors affect a creditor, unless he adopts it? Can the parties alter their situation with respect to the creditor without his assent? Can you cite any authority to show that joint debtors, by their own act, can alter their situation after the contract has been concluded?

For the Respondent. — If the creditor in effect has notice that one of his debtors is the principal, and the other by the effect of a transaction between them is placed in the situation of a surety, or made liable only in default of the principal; his conduct towards the parties so situated ought to be regarded in equity. He ought not to deal with one of the parties so as to affect the other. If he gives time to the principal, he cannot sue the surety. In this case time was given for the benefit of the principal, and to the injury of the surety, or party who had become liable only on default of the principal. If he had known of the transaction, he would have

sued the principal debtor; and this was concealed by collusion of the creditor, who was apprised of the relation in which the two debtors stood to each other. The reasoning and the principle which applies to the case of principal and surety, applies equally to this case; there is no substantial difference.

It is argued on the other side, that the debt upon the bond remains unaffected by the transaction between the debtors. But Oakeley by his own acts consented to accept Reid and Kynaston as his principal debtors, and the executors of Sherard as liable only on default. This state of circumstances is established not merely by the transaction between the parties so liable, but partly by the knowledge, acquiescence, and adoption of the creditor. The sureties by his conduct have lost their remedy: can he now, after long acquiescence, resort to his original rights upon the bond, as if no time had been given, no concealment practised, and the principal debtors were still solvent? The notice of the transfer of the debt affects the creditor, although the transaction occurred before the debt was payable; for by his own letters it appears that time was given to the principal debtors after the debt was payable, and that he concurred in a transaction with the principal debtor, which was concealed from the surety for the express purpose of preventing the forced liquidation of the debt.

*Lord Lyndhurst.* — Kynaston became a new debtor.

For the Respondent. — In *David v. Ellis* it was argued, that there was no discharge, because a new debtor was not acquired. *Thomson v. Percival* shews the distinction arising out of that fact.



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In one of his letters to the new firm, (p. 3.) Oakeley says, (no arrangement having been made for the benefit of his son) “ that it would not be “ convenient for him to enter into any new engage- “ ment for continuing the advancement of the “ 10,000*l.* beyond the period of his former engage- “ ment :” and by his letter of March, 1821, after speaking of his anxiety to close the concerns then outstanding, he again urges Reid and Kynaston upon the subject of a proposal which he expects them to make for the advancement of his son Edward, then their clerk and now the Appellant in this appeal. It appears, therefore, that the creditor had agreed not to call for payment of the debt within three years, and the debtor perhaps not to pay it off. This is an agreement binding upon the parties in law. He might then have compelled payment from the executors ; but he either releases them or treats them as sureties, and the case was decided upon that principle by the Master of the Rolls. (Here the judgment was read by the Respondents’ counsel).

*The Lord Chancellor.*—That judgment assumes that Sir C. Oakeley had notice of the arrangement. This is alleged in the Respondents’ case, and denied in the Appellants’ case. I see no evidence of it.

For the Respondents. — It is to be inferred from the letters and accounts, in which the new firm are treated as his debtors. They pay the interest on the debt, and he gives them indulgence, being his sons-in-law.

*The Lord Chancellor.* — Does it go farther than this, that he treated the House as his debtors?

For the Respondents. — The letters shew that he did not look to Sherard’s executors. In one

letter he says, "he hopes it will be convenient to the house to discharge." This must mean the firm of Reid and Kynaston, to whom the letter is addressed.

*The Lord Chancellor.* — Your case is that he knew it in 1817. In 1823, he provided against the consequences.

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*Lord Lyndhurst.* — The question in this case arose out of a transaction upon which the Appellant claimed, in a suit of *Sherard v. Sherard*, a sum of 10,000*l.*, with interest thereon for a certain period. It appears that the late Sir Charles Oakeley advanced a sum of 10,000*l.* to the firm of Reid and Sherard, who were at that time in partnership, and the repayment of that sum of 10,000*l.* was secured by four several bonds of 2500*l.* each. Sherard died before any part of the money was repaid, and a new partnership was formed between Reid and another person. Reid and his partner entered into an arrangement with the personal representatives of Sherard, by which they agreed to take upon themselves the payment of the debt, in consequence of certain considerations which they received, and to indemnify the representatives of Sherard against it. The name of the new partner was Kynaston, and he was connected with Sir Charles Oakeley. After some considerable time an arrangement was made between Sir Charles Oakeley and Kynaston, without any communication with the representatives of Sherard, to extend the time of payment for a period of three years; the time was accordingly extended, and the question is, what was the effect of the extension of that time, whether it discharged the representatives of

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Sherard from their liability? Now, in consequence of an arrangement which took place between the representatives and the new partnership, they stood in the character of sureties, and the principle of law is this, that where a creditor gives time to the principal, there being a surety, without any communication with the surety, and without the consent of the surety, it discharges him from liability, because it places him in a new situation, and exposes him to risk and contingencies which he would not otherwise be liable to. That being the fact in the present instance, and as the facts bring home the knowledge of all the circumstances of the transaction to Sir Charles Oakeley, it is my opinion, in this case, that the representatives of Sherard were discharged from their liability. That was the opinion of the Master of the Rolls, and that was the opinion of the late Lord Chancellor upon appeal; and I think, under these circumstances, your Lordships will be of opinion that their opinions with respect to this point, and their decisions, were correct. Under these circumstances I should advise your Lordships that the judgment be affirmed; and I think under the circumstances, as the question appears to me to be very clear and distinct, and unembarrassed, and as there have been two successive judgments against the Plaintiff, that in this case, the judgment ought to be affirmed with costs.

*The Lord Chancellor.* — It was my fortune to be counsel for one of the parties when this cause was in the Court of Chancery; and I am extremely glad, therefore, that I had the assistance of my noble and learned friend, who attended the hearing

of this appeal, because I was desirous of abstaining from expressing any opinion of my own upon the question in dispute between the parties, until my noble and learned friend had expressed his; and I shall no further enter into the case than to say that I entirely concur in the opinion which he has expressed.

Decree affirmed with costs.

See pro: *Andrew v. Boughey*, Dyer, 75, a chattel given in lieu of debt, a discharge. *Evans v. Drummond*, 4 Esp. 89; *Reed v. White*, 5 Esp. 122; *Wyatt v. M. of Hertford*, 3 East, 147; *Strong v. Hart*, 6 B. & C. 160; *Smith v. Ferrand*, 7 B. & C. 19; *Exp. Ruffin*, 6 Ves. 119; *Exp. Harris*, 1 Mad. 583.

Con: *Jacomb v. Harwood*, 2 Ves. 265; *Waugh v. Carver*, 2 H. B. 235; *Devaynes v. Noble*, Slesch's case, 1 Mer. 539; and see *Exp. Kendal*, 17 Ves. 514, dict. of Lord Eldon, as to discharge of estate of deceased debtor. *Bedford v. Deakin*, 2 B. & A. 210; *Lodge v. Dicus*, 3 B. & A. 611; *Robinson v. Read*, 9 B. & C. 449; *Orr v. Chase*, Note to *D. v. N.* 1 Mer. 730.

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SCARLET

D.

LUCTON SCHOOL.

## ENGLAND.

(COURT OF EXCHEQUER.)

JOHN SCARLET, EDWARD SCARLET, } *Appellants ;*  
 and JAMES PROUDMAN - - }

The GOVERNORS of the FREE }  
 SCHOOL in LUCTON, and KEDG- } *Respondents.*  
 WIN HOSKINS and THEOPHILUS }  
 LANE - - - }

By a charter of Hen. I., Reading, Chelsea, and Leominster, with their appurtenances, churches and chapels, oblations and tithes, were granted to the abbot and convent of Reading. The church or rectory of Eye was an appendage to the church of St. Peter, Leominster, comprehending the vicarage of Eye, and the manor and township of Lucton, which was part of the lordship of Leominster. Upon the attainder of the abbot of Reading, 30th Hen. 8., the abbey was dissolved, and the possessions of the abbey and convent, including the church and rectory of Eye, with all tithes thereto belonging, vested in the Crown.

By letters patent of 10th James I., the king granted to M. and P. in fee, "All those our tithes yearly, and from time to time coming, growing, or renewing in Lucton, &c. and in the manor of Lucton, &c. including tithes of hay of &c. (particular lands specified as being in the occupation of tenants named;) and all tithes of lands in Lucton in the occupation of &c. all which are within the lordship of Leominster, and were formerly parcel of the possessions of the late cell or priory of Leominster, being a cell annexed to the late monastery of Reading, excepting advowsons of rectories, &c.; to hold the aforesaid rectories, tithes, &c."

From the time when the possessions of the abbey had vested in the crown, leases had been from time to time granted of the tithes of Lucton; but no mention was made in these leases of the rectory of Eye.

The occupiers of lands in Lucton had usually paid to the grantees and those who claimed under them, tithes of corn and grain, and every other species of tithe, except of hay and agistment, the right to which they disputed, on the ground that the grantees were not to be considered as rectors of Eye, but as grantees of portions of tithes; that in the ministers' accounts detached portions only of tithes were stated, and not the tithes generally of the rectory of Eye; and that tithes of hay and agistment had never within memory been paid in respect of such lands, and that it ought to be presumed, that there had at some time been a conveyance of those tithes to the owners of the lands. On the other hand, it was proved, that there had been various suits on behalf of the grantees claiming all the tithes, and decrees in some of those suits against the occupiers, who did not set up the defence of exemption from the tithes of hay and agistment. It also appeared, that the grantees under the crown, had repaired the chancel of the parish church.

Held under these circumstances, that although it might be doubtful upon the construction of the grant, whether it passed the rectory, yet that it was sufficient to carry all tithes; that they were entitled to the common presumption in favour of rectors, and that a grant of the tithes of hay and agistment could not be presumed in favour of the occupiers.

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**T**HE Respondents, the governors of Lucton Free School, founded by John Pierrepont, claimed to be owners of the tithes within the chapelry of Eyton, and the township of Luston, and the manor of Luston, within the rectory and parish of Eye, in the county of Hereford, other than and except the tithes payable to the vicar of Eye, and the curate of Eyton.

The Respondents, Kedgwin Hoskins and Theophilus Lane, were the personal representatives of Philip Pymble, who, at the date of the decree from which this appeal was brought, was lessee of these tithes, under the first-named Respondents.

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The Appellants were occupiers of land within the rectory, and within that part of the vicarage of Eye, which is within the manor of Luston.

The rectory or parish of Eye, comprehends the vicarage of Eye, and the several chapelries of Eyton, Lucton, Yarpole, Orlton, Bromfield, Middleton, Kymbolton, and Hope Mileton or Miles Hope, and extends over the manor of Luston, and the township of Eyton is included in the chapelry of Eyton, and the township of Lucton is included in the chapelry of Lucton, and the townships of Birchor and Yarpole are included in the chapelry of Yarpole, and the township of Luston is included in the manor of Luston.

The vicarage of Eye and the several chapelries before mentioned, are all endowed.

The church or rectory of Eye was originally an appendage to the church of St. Peter, Leominster. The manor of Luston was parcel of the lordship of Leominster.

By a grant of King Henry I., Reading, Chelsea and Leominster, with all their appendages, with woods and arable lauds, and pasture lands with meadow lands and water, with mills and fisheries, with churches and chapels, and churchyards, and oblations and tithes, with a mint and moneyer at Reading, were granted to the abbot and convent of Reading; and by the same charter King Henry I. decreed, that no person should hold any of the said possessions of the said abbot and convent and their successors, in fee, but only at a yearly rent and services to be reserved to the abbot and convent.

Before, and at the time of the dissolution of the monasteries by King Henry VIII., the abbot and convent of Reading, in right of their cell or

priory of Leominster, were seised of an estate of inheritance, in fee simple, of and in the lordship of Leominster, and the manors and mesne manors thereunto belonging, and particularly of and in the manor of Luston, and its demesne lands, which, at the time of such dissolution, were in the hands or manurance of the prior of Leominster.

The property of the abbey of Reading having, like that of other abbeys, been transferred to the crown on the dissolution of the monasteries, King Henry VIII., by letters patent, dated 27th February, 1540, demised the "Firme of the scite of " the manor of the Bury in Luston, in the county " of Hereford, with all land, meadows, feedings, " pastures, and tithes of grain, hemp, bees and " apples, to the same manor and township of Lus- " ton belonging, and small tithes there," to one Robert Brothat, for a term of twenty-one years, at the rent of 27*l.* 7*s.* 10*d.*

In the year 1549, King Edward VI. demised the " Manor of Luston, and the scite and soil of " the same," to Sir James Croft, to hold as tenant at will, and in the general words, " tithes" are included.

By letters patent, of the third and fourth of Philip and Mary (A. D. 1556,) Queen Mary granted a reversionary lease of the manor of Luston, to one John Goodinge, for twenty-one years. The description of the property demised by this lease is the same as that in the lease to Brothat, omitting the words, " and tithes of grain, hemp, bees and " apples, to the seme manor and vill of Luston " belonging, and the small tithes there."

By letters patent, of the first of Queen Elizabeth, dated the 5th of August, 1558, (being still prior to

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the expiration of Brothat's term), her Majesty granted a lease for twenty-one years, at the rent of 40*l.* 1*s.* 4*d.*, to Sir James Croft, of tithes alone, by the following description:— "Divers our tithes  
 " arising or growing in Luston, Eyton, Lucton and  
 " Byrchor, in the county of Hereford, to the manor  
 " of Luston, with the members in the said county  
 " belonging or appertaining, and the tithes of divers  
 " lands there, now or late in the several tenures or  
 " occupations of John Evans, Thomas Shotter,  
 " John Wind, John Hereford, John Shepherd,  
 " Margaret Jones, William Winde, Walter Hick-  
 " man, Robert Pates, Richard Winde, Thomas  
 " Buble, William Engle, Thomas Rocke, and John  
 " Smith, and certain other our tithes of divers  
 " lands, of a certain mill in Eyton aforesaid, now  
 " or late in the several tenures or occupations of  
 " Elizabeth Stephens, Edmund Burthope, John  
 " Canope, John Engle, Nicholas Debden, George  
 " Moneze, Richard Coren, and Hugh Pell,  
 " also certain other our tithes, in the marsh of  
 " Leominster, to wit, the tithes of hay of Reading  
 " Hall, the tithes of lands there of Albo Birche,  
 " the tithes of hay, there, now or late in the tenure  
 " of John Morice, and the tithes of lands in Yar-  
 " pole, now or late in the several tenures or occu-  
 " pations of Edward Cooper, Robert Philippes,  
 " Thomas Mylward, William Malyn, John Bar-  
 " thope, Richard Blysse, and Thomas Colyns, and  
 " also divers other tithes of lands in Birchor and  
 " Yarpole aforesaid, now or late in the several  
 " tenures or occupations of William Noblett,  
 " Thomas Wall, Richard Awall, the aforesaid  
 " Jacob Crofts, knight, Richard of Waswall, John  
 " of Waswall, Walter Wenmore, John Gold,

“ Thomas Higgins, Thomas Dyrrye, and Philip  
 “ Barnes, and certain other tithes of lands in  
 “ Lucton aforesaid, now or late in the several  
 “ tenures or occupations of John Galthe, John  
 “ Wigmore, John Galthe, John Crubbe, Richard  
 “ Clee, Thomas Davies, and Thomas Marshe, and  
 “ our tithes in Orlton, arising from Bennett’s  
 “ farm, now or late in the tenure or occupation of  
 “ Agnus Atferton; all and singular the tithes afore-  
 “ said, with their appurtenances, were late parcel  
 “ of the possessions late of the priory of Leominster,  
 “ in our said county of Hereford, to the late  
 “ monastery of Reading, in our county of Berks,  
 “ belonging or appertaining, and to the said manor  
 “ of Luston, with its members, parcel of the lord-  
 “ ship of Leominster, in the said county of Here-  
 “ ford, belonging and appertaining.”

Queen Elizabeth having granted this last men-  
 tioned lease of tithes to Sir James Croft, subse-  
 quently by other letters patent of the 10th of  
 January, in the same year, granted to him the  
 manor of Luston by the same description as is used  
 in the demise to Goodinge, to be held by him as  
 tenant at will to her, and ultimately by other letters  
 patent dated the 4th of September, 1572, being  
 the fourteenth year of her reign, after reciting the  
 lease to Goodinge, and the lease at will to Sir James  
 Croft, and after determining the tenancy at will,  
 Queen Elizabeth again granted the same property  
 by the same description to Sir James Croft, for  
 life, with remainder to his son and the heirs male  
 of his body.

In the twenty-first year of her reign (Sir James  
 Croft having previously surrendered the lease of  
 the 5th of August, 1558,) Queen Elizabeth, by let-

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ters patent, dated the 14th of May, 1579, reciting the lease of the 5th of August, 1558, granted another lease to Sir James Croft for twenty-one years, of tithes, by a description which commences, "All those our aforesaid tithes yearly from time to time growing, arising, or accruing in Luston, Eyton, Lucton, and Byrchor, or in any or either of them, in our county of Hereford; and our manor of Luston, with its rights, members, and every appurtenance to the same; and all those our tithes, of all those our lands with appurtenances, there, now or late in the several tenures or occupations of John Evans, (and the fourteen other persons whose names follow that of Evans in the description in the lease of August 5th, 1558,) or any or either of their assigns." The description then proceeds to specify tithes of particular lands in Eyton, Birchor, Yarpole, and Lucton, by the names of the occupiers, which also correspond with the names used for the same purpose in the lease of August 5th, 1558, and concludes with an enumeration of lands and tithes in the manor and rectory of Orleton. The rent reserved by this lease differs from that reserved in the lease of August 5th, 1558, only as it consists in two sums of 30*l.* 2*s.* 4*d.* and 10*l.* instead of in one sum of 40*l.* 1*s.* 4*d.*, the former of the two (the 30*l.* 2*s.* 4*d.*) being stated to be reserved in respect of the tithes within the lordship of Leominster, and the latter (the 10*l.*) in respect of those in Orleton, which from that circumstance would rather appear not to have been within the lordship of Leominster.

In the year 1583, (the lease of the 5th of May, 1579, having been surrendered,) Queen Elizabeth by letters patent, dated February 2d, 1583, being

the twenty-fifth year of her reign, granted the property comprised in the lease of the 5th of May, 1579, to Lady Catherine Croft for life, with remainder to Edward Croft and Herbert Croft, successively for their lives, at the same rent and by the same description as in that lease.

In the year 1602, being the forty-fourth of her reign, Queen Elizabeth made another grant (appearing in fact to be merely an addition of fresh lives to the lease of 1563,) to Herbert Croft, for the lives of himself, his wife, and his son William, of those tithes within the lordship of Leominster which are comprised in the former grants to the Croft family, and are subject to the exact rent apportioned on them by the lease of 1579, namely, 30*l.* 2*s.* 4*d.*

James I., by a grant, dated the 24th of March, in the tenth year of his reign, to Francis Morris and Francis Phelips, their heirs and assigns, after enumerating and describing different manors, lands, &c., and also several churches and rectories intended to be granted, (among which neither the churches nor rectories of Leominster or Eye are included,) describes the tithes granted within the lordship of Leominster in the following words: — “ All those our tithes yearly and from  
“ time to time coming, growing, or renewing, in  
“ Luston, Eyton, Lucton, Birchor, and Yarpole, or in  
“ any or either of them, in our county of Hereford,  
“ and in or within the manor of Luston, with all their  
“ rights, members, and appurtenances, in the said  
“ county of Hereford : And all those our tithes  
“ of all those lands with the appurtenances there,  
“ now or late in the several tenures or occupations  
“ of John Evans, Thomas Shorter, John Winde,

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“ Thomas Hereford, John Shepherd, Margery  
 “ Jones, William Wilde, Walter Hickman, Robert  
 “ Pales, Richard Winde, Thomas Bubb, William  
 “ Engle, Thomas Rocke, and John Smith, or of  
 “ any or either of them, or of their assigns, or of  
 “ the assigns of any or either of them ; and also all  
 “ those our tithes yearly, and from time to time  
 “ coming, growing, and renewing from all those  
 “ lands, tenements, mills, and hereditaments what-  
 “ soever in Eyton, in our said county of Hereford,  
 “ now or late in the several tenures or occupations  
 “ of Elizabeth Stephens, Edward Birthope, John  
 “ Conope, John Engle. Nicholas Debden, George  
 “ Monox, Richard Corewe, and Hugh Poll, or of  
 “ the assigns of them, or any or either of them ;  
 “ and all those tithes in the marshes of Leominster,  
 “ in the aforesaid county of Hereford, (that is to  
 “ say) all those tithes of hay yearly, and from time  
 “ to time coming, growing, or renewing, in Read-  
 “ inge Hall, and the tithes of all those lands there  
 “ now or late of Albou Birche, or his assigns ; and  
 “ also all those tithes of hay there now or late in the  
 “ tenure or occupation of John Morice, or his assigns,  
 “ and also all those our tithes of all those lands in  
 “ Yerpole aforesaid, in the said county of Here-  
 “ ford, now or late in the several tenures or oc-  
 “ cupations of Edmund Cooper, Robert Phillips,  
 “ Thomas Milward, William Malin, John Birthope,  
 “ Richard Bliss, and Thomas Collins, or of any or  
 “ either of them, or of the assigns of them, or of either  
 “ or any of them : And all those our tithes of all  
 “ those lands in Birchor and Yerpoll, or in either of  
 “ them, in our aforesaid county of Hereford, now  
 “ or late in the several tenures or occupations of  
 “ William Noblett, Thomas Wall, Richard Awalle,

“ Sir James Acrofte, knight, Richard Dewaswall,  
 “ John de Waswall, Walter Wenmore, John Gole,  
 “ Thomas Higgins, Thomas Dirry, and John Barnes,  
 “ or of any or either of them or of their assigns, or  
 “ of the assigns of any or either of them. And all  
 “ those our tithes of all those lands in Lucton, in  
 “ our aforesaid county of Hereford, now or late in  
 “ the several tenures or occupations of John Galthe,  
 “ John Wigmore, John Galthe, John Grabbe,  
 “ Richard Clee, Thomas Davies, and Thomas  
 “ Marsh, or of any or either of them, or of their  
 “ assigns, or of the assigns of any or either of them;  
 “ all and singular which premises are situate, lying,  
 “ growing, and being within the lordship of Leo-  
 “ minster, in the aforesaid connty of Hereford, and  
 “ are of the yearly rent or value of 30*l.* 2*s.* 4*d.*,  
 “ and were formerly parcel of the lands and pos-  
 “ session of the late cell or priory of Leominster,  
 “ in the said county of Hereford, being a cell an-  
 “ nexed to the late monastery of Reading, in our  
 “ county of Berks.”

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The title of the Respondents was deduced through several mesne conveyances from Morris and Phelips, to one John Pierrepoint, in the year 1707, and from him derived by means of a conveyance in the year 1708, to certain persons as trustees for charitable purposes, and of an act of the 7th of Ann, constituting these trustees and their successors a corporation by the style of “The Governors of the Free School in Lucton.”

In the year 1824, the Respondents, the governors, and the testator of the other Respondents, filed a bill in the Exchequer against the Appellants and other Defendants (against whom it was dismissed by an order dated May 1st, 1826), stating, among

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other things, the grant of James I., the conveyance by Pierrepont, and the act of the 7th of Ann, an agreement between the Respondents, the governors of Lucton Free School, and Philip Pymble, the testator of the other Respondents, dated November 8. 1820, for a lease to him of the tithes of the townships of Yarpole, Bircher, and Luston, and also the occupation by the Appellants of lands within the township of Luston, and the chapelry of Eyton, in the manor of Luston, and the perception by them of titheable matters, charging payment to have been already made by the Appellants, of all tithes of corn and grain, and praying an account and satisfaction for the tithes of hay and grass, calves, lambs, colts, milk, potatoes, turnips, garden stuff, and fruit, since the 25th of December, 1820, and for the value of the tithes of agistment, in respect of unprofitable sheep, and other barren and unprofitable cattle fed by the Appellants, upon their farms or lands, within the township of Luston, or within the manor of Luston, or the chapelry of Eyton.

In Hilary term, 1825, the Appellants put in their answer, by which, among other things, they admitted an occupation within so much of the vicarage of Eye as is within the manor of Luston, and the perception of titheable matters, but did not admit the title of the governors of Lucton School, and they set up certain moduses in lieu of the tithes of milk, calves, colts, lambs, and gardens, and stated that they had set forth the tithes of all clover of the first year's vesture, and apples, and pears, not being the produce of gardens, since the year 1820, and that they had been taken away by Philip Pymble, and that they were ready to pay

the moduses; the Appellants then proceeded to state:

“ That no tithes of hay or agistment, or of any  
 “ other titheable matters and things, or any satis-  
 “ faction in lieu thereof, except the tithes of corn  
 “ and grain, hemp, flax, clover of the first year’s  
 “ growth or vesture, hops, apples, pears, pigs, geese,  
 “ and eggs; and the aforesaid moduses and cus-  
 “ tomary payments in lieu of the tithes of milk,  
 “ calves, colts, lambs, wool, and gardens, or the  
 “ produce thereof, had ever within the memory of  
 “ any person living been rendered or paid within  
 “ such parts of the said rectory of Eye as were  
 “ within the said vicarage of Eye, and within the  
 “ said manor of Luston; and insisted that at some  
 “ former periods or period some body corporate or  
 “ person or persons having good right, title, and  
 “ power so to do, executed some grants or grant,  
 “ releases or release, by virtue whereof the tithes  
 “ of hay agistment, and of all other titheable mat-  
 “ ters and things within such parts of the said  
 “ rectory of Eye as were within the said vicarage  
 “ of Eye, and within the said manor of Luston as  
 “ aforesaid, except as aforesaid, were granted or  
 “ released unto, or became vested in the owners of  
 “ the several farms and lands situate within such  
 “ parts of the said rectory of Eye as were within  
 “ the said vicarage of Eye, and within the said  
 “ manor of Luston, and have ever since been en-  
 “ joyed therewith.”

The cause being at issue, witnesses were examined on both sides, and by the testimony of those for the defence, and by the cross-examination of one of the witnesses for the Plaintiffs, the moduses insisted on were established, and it was also proved

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that no tithes of hay or agistment, or any satisfaction in lieu of them, or tithes of any other titheable matters, or any satisfaction in lieu of them, except tithes of corn and grain, hemp, flax, clover of the first year's vesture or growth, clover, and hops, apples, pigs, geese, and eggs, and except the moduses in lieu of the tithes of milk, calves, colts, wool, lambs, and gardens, had within the memory of man every been paid to any one within such parts of the rectory of Eye as are within the vicarage of Eye and the manor of Luston.

In addition to the parole testimony, a large mass of documentary evidence was also adduced. \*

The cause having been brought to a hearing, the Appellants, by the first part of the decree, dated the 31st of November, 1827, were ordered to account with and pay to the Respondents, the governors, and the testator of the other Respondents, the tithes of hay, grass, potatoes, turnips, and fruit, not the produce of gardens, and also the tithes of the agistment of all sheep not producing wool or lambs, and of other barren, dry, and unprofitable cattle and horses, which had arisen, grown, renewed, and increased on the several farms, lands, and tenements in their respective occupations within the township or vill of Luston, and manor of Luston, and rectory of Eye, since the 25th of December, 1820, with costs; and the usual directions were given for taking the accounts.

With respect to the tithes of calves, milk, lambs, colts, and garden stuff and fruit, being the produce of gardens, the Respondents declining to try issues on the validity of the moduses set up by

\* See the Appendix to the printed cases.

the Appellants, their bill as to those was by the latter part of the decree dismissed with costs.

The suit by the Respondents, the governors, and Philip Pymble, against the Appellants, and the proceedings under it, becoming abated after the passing and entering of the decree, by the death of Philip Pymble, the Respondents, the governors of the Free School in Lucton, and the Respondents, Kedgwin Hoskins and Theophilus Lane, as the executors of Philip Pymble, exhibited their bill of revivor in the Court of Exchequer, against the Appellants, in Hilary term, 1833, to which the Appellants appeared, and the Court of Exchequer made an order on the 14th of February, 1833, that the suit and proceedings should be revived against the Appellants.

The appeal was against that part of the decree of the 31st of November, 1827, by which it was ordered, adjudged, and decreed, that the Defendants should severally account with, satisfy and pay to the Respondents, the governors, and the testator of the other Respondents, the tithes of hay, grass, potatoes, turnips, and fruit, not the produce of gardens, and also the tithes of the agistment of all sheep not producing wool or lambs, and of other barren, dry, and unprofitable cattle, and horses, which had arisen, grown, renewed, and increased, on the several farms, lands, and tenements, in the respective occupations of the Appellants, within the township or vill of Luston, and manor of Luston, and rectory of Eye, in the pleadings of the said cause mentioned, since the 25th of December, 1820, with costs, and whereby it was ordered, that it should be referred, &c.

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For the Appellants, Mr. *Boteler* and Mr. *Wigram*.

The Respondents, the governors of the Free School in Lucton, are entitled to the tithes, (whatever they may be,) to which they are entitled in the chapelry of Eyton, and the township of Luston, and in the manor of Luston, as portionists or grantees of particular tithes only, and not as rectors, and consequently are entitled no further than their grant is supported by usage.

The evidence in the cause clearly proves the non-payment of the tithes for which the Appellants were ordered by the decree to account, or any composition or modus in lieu thereof, to the governors of the Free School in Lucton, or their lessees.

Under the circumstances, it ought to be presumed that the tithes, for which the Appellants were ordered by the decree to account, have at some former period been granted or released to the owners of the lands, out of, or upon which they are claimed, by some person or persons competent so to do.

For the Respondents, Mr. *Tinney* and Mr. *Loftus Lowndes*.

From the evidence produced, it appears that the abbot and convent of Reading, before the time of legal memory and up to the dissolution, were entitled as rectors to the tithes in question in this appeal.

The grant from the Crown in the 10th James I. conveyed all the tithes of which the said abbot and convent had been possessed, and the Respondents have proved themselves to be entitled to all the tithes conveyed by such grant.

The evidence of the different suits, and the other parol and documentary evidence in the cause, is consistent with and supports the claim of the Respondents to the said tithes; and no claim, except that of the Respondents, has ever been set up to the said tithes or any part of them.

The defence set up in the cause by the Appellants is unsupported by evidence, and is no legal ground of discharge from the payment of the tithes claimed by the Respondents.

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*The Lord Chancellor.* — This was a bill filed to 19th Aug.  
 recover tithes, by the trustees of Lucton School, against certain persons occupying lands within a district called Lucton, which Lucton formed part of the rectory of Eye. There was no question as to the right of the Plaintiffs to receive the tithes of corn, grain, and a great variety of other tithes; but the Defendants insisted that they were not liable to pay tithes of hay or agistment.

The history of this property and the origin of the Plaintiffs' title is involved in considerable obscurity. It appears that by a charter, Henry I. had granted to the monastery of Reading what is described as the priory of Leominster, and that part of the possessions of that priory consisted of the rectory of Eye.

The fact, that the rectory of Eye was the property of the monastery of Reading, was further confirmed by the judgment in *quare impedit* in the 11th of Edward I., by which it is found that the church of Eye, belonged to the abbot of Reading. In Pope Nicholas's Taxation, in the year 1291, there is this entry, "*Ecclesia de Eya cum capellis suis prior. Leomen.,*" which priory of Leo-

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minster, as I have before stated, is proved to have been part of the possession of the monastery of Reading.

It appears that in the 3d of Edward VI., the possessions of this monastery of Reading having come to the Crown, upon their dissolution in the reign of Henry VIII., there was a demise from the Crown to Sir James Croft, of the manor of Lucton, part of the possessions of the late cell of Leominster, and to the late monastery of Reading belonging, and all and singular messuages and tithes, &c. situate, renewing in Lucton, &c. to the said manor of Lucton belonging, tithes of corn, grain, and hay, &c. and other tithes whatsoever in Lucton, &c. late parcel of the possession of the cell of Leominster, which the lessee was to hold in as ample a manner as the monastery of Reading had held the same. From this short statement of the early history of this property, no doubt whatever can exist, and no question was made at the hearing, but that the rectory of Eye had been part of the possessions of the monastery of Reading, as part of the cell of Leominster; that that rectory came to the Crown upon the dissolution of the monastery; and the Crown being in possession, the question arises upon the mode in which the Crown dealt with it in the tenth of James I., in a grant to two persons of the names of Morris and Phillips.

Now the terms of that grant are, "all those tithes renewing in Lucton, formerly part of the possession of the cell of Leominster, annexed to the priory of Reading, and all tithes of sheaf, blade, grain, and hay, &c. and all other tithes, &c. and all payment for tithes, or in satisfaction of tithes,

&c. to the aforesaid rectories, churches, chapels, prebends, messuages, and other the premises belonging, &c. except the advowsons of the rectories to the premises belonging; to hold the same to those two persons. The whole question turns upon that grant. In the extract from it which I have stated, your Lordships observe, that there is a grant of the rectories, and also of the tithes of hay. It was matter of contest at the bar, and matter of observation which is undoubtedly founded in fact, upon a minute examination of that grant, that there are other rectories in respect to which no question arises comprised also in that grant, and the argument therefore was, that though the term rectory is found in the grant, there are other rectories to which that term might be found to apply, and it does not therefore necessarily follow that there was a grant of the rectory of Eye; but that part of the grant with respect to which there was no dispute, and which is not qualified by any other part of the grant, is the grant of all tithes in Lucton.

It appears that the rectory of Eye was much more extensive than the district of Lucton, which may explain why it was that this grant from the Crown, if it was intended only to comprise the tithes of the particular district called Lucton, did not include the rectory of Eye, and undoubtedly there is no portion of that grant which in terms professes to convey the rectory of Eye.

From these two persons who are the grantees under this instrument, the title is regularly derived by a person of the name of Pierrepont, who endowed the school, and the title is now vested in trustees under a conveyance from Mr. Pierrepont.

On the part of the Defendants, the ground of

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defence is this:—They say the Plaintiffs are not proved to be impropriate rectors; that if they are not impropriate rectors, they are not entitled to those presumptions of law which belong to lay as well as ecclesiastical rectories: if therefore they cannot prove perception of the tithes, they are not entitled to call upon the Defendants to make payments which have not hitherto been made by the Defendants. It is true, that there is no proof of payment of tithe by these particular Defendants, in respect of these particular lands; but there is proof of the Defendants being liable to tithes, which is receivable evidence for the purpose of shewing that the grant comprised all the tithes within that district; namely, that the grantees had been in the habit of receiving tithes and of compelling payment of the tithes in question, from lands in Lucton.

Now if there were any ambiguity in the phraseology used in the grant, as to whether tithes in Lucton were or were not intended to be comprised in it, the fact of the title resting upon that instrument only, having been considered as available for the purpose of entitling those who held under that grant to receive tithes in Lucton, would be very legitimate evidence for the purpose of putting a construction upon doubtful words to be found in that instrument.

It happens that there are no less than five suits, three of which are applicable to the present case: the suit of *Penny v. Hoper*, in the year 1721, in which persons claiming under this title demand tithes of hay from certain occupiers in Lucton, and by decree of the Court of Chancery, in England, they were decreed entitled to those tithes. Another

suit, *The Attorney-General v. Keysall*, was instituted in the year 1734, in which also parties claiming under a similar title recovered tithes of hay, against persons occupying lands in Lucton. Another suit, *The Attorney-General v. Stephens*, was instituted in 1743, but which does not appear to have ever led to a decree. The pleadings however are produced, and the depositions of witnesses, in which the dispute is not raised as to the title of the Plaintiffs to tithes of hay, in Lucton: but moduses are set up, and the Defendants seek to escape, not by proving a defective title in the Plaintiffs, but by an adverse title set up by themselves.

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The Plaintiffs' case is this; namely, that although the Defendants dispute the title to the rectory and to the tithe of hay and agistment, they do not dispute the right of the Plaintiffs to receive tithes from lands in Lucton, for they pay on account of the tithes of corn and grain, and every other description of tithes, with the exception of tithes of hay and agistment: and they set up certain moduses. Now when the question, therefore, is, what is the effect of the grant? did or did not the grant operate to convey the title to tithes in that district of Lucton? and we find that the parties claiming under that instrument have not only obtained decrees against other persons for the payment of tithes of hay in Lucton, but that these very Defendants account for all the more valuable description of tithes to the Plaintiffs holding under that very title, it appears to me that no reasonable question can be raised as to the effect of that grant being to convey to the grantees, and those who now claim under them, a right to receive such tithes as were payable out of the lands in Lucton.



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It appears that in the year 1707, there was a lease from this Mr. Pierrepont to one Sir Herbert Croft, of the tithes in Lucton, with a covenant for the lessee to repair the chancel of the church; and parol evidence was given, that the Plaintiffs had in fact repaired the chancel of the church. Now if it were necessary for the purpose of establishing the Plaintiffs' rights, to shew that they were rectors; the terms of the grant being ambiguous, and it being extremely difficult at this time of day, not knowing the exact situation of the property as it existed at the date of the grant, to ascertain whether the terms used were intended to convey the rectory or not; the fact of their having received the tithes, and their having repaired the chancel of the church, and which obligation upon the receiver of those tithes appears to have existed so late as 1707, would undoubtedly be very strong and cogent evidence.

Now in this case, the Defendants admit that the monastery of Reading was, before the dissolution, possessed of the rectory of Eye, that it came to the Crown, that tithes of corn had been paid; and they set up moduses for various other titheable matters. But then their defence is this, they say in the first place, the Plaintiffs do not hold the rectory, and therefore that they are not entitled to the benefit of any presumption. And as another defence, although they have no deed to produce, and do not profess to shew evidence of the transaction, which they ask your Lordships to imply, yet it appearing that the manor and lands were in the possession of the Crown, they say that it must be presumed that at some time or other, when the

lands were conveyed to that party through whom they claimed, the tithes were conveyed with it.

That mode of defence it has not been very unusual to adopt where parties claim exemption from tithes altogether ; but it is a very singular defence where the title set up is insisted upon not as applicable to all tithes, but as applicable to a particular description of tithes. The conveyance would be not of the lands with the tithes, the supposition being that the grantor of the lands was also owner of the tithes, and therefore, that it was competent to him to grant the lands and tithes together, or not, as he pleased ; but the presumption must be, that the person the owner of the lands, and the owner of the tithes, conveyed the lands and a particular description of tithes only.

The Defendants were in possession of their own title-deeds, and they, if there had been any grant of any particular description of tithes, would have been bound to produce that document. They have not produced any such evidence. They only ask your Lordships to infer, that such may have been the origin of their title, from the fact of the tithes of agistment and hay not having been paid.

In order to raise the defence so set up, not of a title in themselves but of a defect of title in the Plaintiffs, the Defendants have endeavoured to prove, from various old documents, that the Crown had not the tithes in question, but that they had only certain portions of tithe in Lucton ; and to make out this proposition they produce the minister's accounts, which, so far as they are capable of being understood, certainly bring into account not the tithes generally of the rectory of Eye, but certain detached portions, as they are called in the

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minister's account, certain distinct sums as one account of the rectory of Eye:—and in the minister's account it is headed “*Ecclesia de Eya cum capellis*,” and then there is an abbreviation which is considered to mean portions. The obvious and common meaning of a portion of tithes, is where the rector of one parish is entitled to a portion of tithes in another parish; but the construction which the Defendants would put upon this instrument is this, that whereas the rector was not entitled, as they say, to all the tithes in the parish, he was partially interested in the tithes of the parish; they call that a portion of tithes. That undoubtedly would not be considered as a legitimate use of the word, at the present time.

Whether the Plaintiffs be entitled to the rectory or not, is, undoubtedly, a question of very considerable doubt; and, if it were necessary to come to any conclusion upon that subject, it might lead to considerable embarrassment in the discussion of this case; but one thing is quite clear upon the evidence, that they derive a title from the person who was rector, namely the Crown, and that they take under a grant of all the tithes of Lucton.

Now if the rector were suing for tithes in Lucton, it is not disputed but that, under the evidence as it appears in this case, he would be entitled, although there never had been such a tithe paid, to demand payment of every tithe which the Defendants, the occupiers of the lands, could not prove to have been properly and legally discharged. So it would be if the rector grants a lease of his tithes: the lessee suing in his right, and under a grant so obtained from the rector, is invested with all the rights and is entitled to all the presumptions

that would belong to the rector : they are not presumptions in favour of the lessee as lessee, but they are presumptions belonging to the rector ; and the lessee, suing in right of the rector, is entitled to the benefit of all such rights as he can show that the rector is entitled to.

Here, then, we have a plain case, at all events, without discussing the question further as to whether the Plaintiffs were rectors or not. Beyond all question they are the purchasers or grantees of the tithes of the impropriate rector ; and I apprehend, therefore, that it is incumbent upon those who are resisting the claim of the parties, so claiming under the right of the rector, to shew, if they can, a legal discharge, and that they are not entitled to ask your Lordships to reverse the direction for taking account of the tithes, merely upon the ground of the tithes not having hitherto been paid. An attempt was made to shew that there was some claim and title in the vicar. That would obviously be quite inconsistent with the other part of the case which the Defendants set up ; but the answer to that objection is, that they have not made that defence ; they have not said, we are to pay tithe of hay, but we not believe you are entitled to it. If they had set up that defence, it would have been the duty of the Plaintiffs to bring before the Court the vicar so identified with them, and their duty to shew his title to the tithe of hay. But their defence is, that they have paid no tithe of hay to anybody, that tithe of hay is not payable, and not that another party (the vicar) may come and attempt to shew that it is payable to him and not to the rector.

It appears that there is considerable evidence to

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shew the general title of the Plaintiffs, and to negative the ground set up by the Defendants, that the Crown had only a portion of tithes of the land ; for it appears that the Plaintiffs have been used to repair the chancel, and to receive the tithes of hops and potatoes, which did not exist at the date of the grant, and could only be derived under a particular grant at the particular time. But, however that may be, the ground upon which I am of opinion that the Plaintiffs are entitled is this: they have proved the rectory, within which Lucton is situated, to have been in the Crown ; they have proved a grant from the Crown of all the tithes that the Crown had in Lucton ; and they have proved that, under that grant, they have received the tithes of various titheable matters from the Defendants ; and the Defendants have not established any ground of defence to shew that, by any legal means, their lands have become discharged from the tithe of hay.

When this case came on to be heard in the Court of Exchequer, after a very long argument, and after the Court had taken time to consider it, the then Chief Baron Sir William Alexander gave a very long, elaborate and learned judgment, in which he went through the whole of the facts of the case, and came to the conclusion that the Plaintiffs were entitled, as against the Defendants, to have payment of tithes of hay upon the lands in question. I have very carefully looked through all the authorities referred to, and I have very attentively considered the arguments adduced at the bar by the Respondents, and in support of the Appellants' case ; and I am of opinion, upon a clear conviction in my mind, that the Chief Baron came

to a right conclusion, and that the Judgment in the Court below is correct; I therefore move your Lordships to affirm that Judgment.

This being a case in which the Defendants have had a very full hearing in the Court below, turning upon a question of title, and the Court below, as is usual in such cases, having made a decree with costs, I think your Lordships will be of opinion that the costs ought to follow the result of the appeal.

Decree affirmed with costs.

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## APPENDIX.

### SCOTLAND.

(COURT OF SESSION.)

M'TAGGART - - - *Appellant ;*

ROBERT WATSON - - - *Respondent.*

A. was bound jointly with B., the trustee of a bankrupt estate in Scotland, to the extent of 1,000*l*. The condition of the bond was, that B. should faithfully discharge his office, account, &c. The creditors of the bankrupt, according to the practice in Scotland, choose three commissioners to act for them, and superintend the proceedings of the trustee. B., by various contrivances amounting to fraud against the estate, was found in arrear to the amount of 1,000*l*. Whereupon the bond being put in suit against A., he pleaded that the commissioners, by neglect and connivance, had caused and permitted the default, or knowing it had concealed it from him. Of this imputation there was no distinct proof. It was held that even on that supposition A. was not discharged.

**LORD BROUGHAM.**—In this case the Respondent had become surety for W. Jeffery the trustee, on the sequestrated estate of the Gorbals Spinning Company, and had given the usual bond for Jeffrey's conduct, and accounting as such trustee. By the Scotch forms of proceeding the bond is not given to any individual as obligee, but

it is an obligation to the extent of 1,000*l*. by the trustee and his cautioner jointly, and in which both are principal obligors. As the condition is, that W. Jeffery shall faithfully and regularly discharge his office of trustee; and as the creditors afterwards choose three commissioners to act for them, we may say, in a sense, to represent them in their dealings with the trustee, and in some sort to control, or, at least, to superintend, his proceedings, we may allow it to be held that those creditors, and, it is said, the commissioners thus appointed by them, and acting on their parts, are the obligees, and that their acts, for example, in releasing the principal obligor, W. Jeffery, would discharge Mr. Watson his surety; that any connivance at Jeffery's misconduct, and any act otherwise injurious to the rights and equity of the surety Watson, and done behind his back, would release him, as much as if the bond had been given to them instead of being left indefinite as to the person of the obligee. We are thus making the most favourable suppositions possible to the Respondent; for we are not only assuming the creditors to be represented and bound by the commissioners, but we are allowing Watson to be a surety only, whereas he is a principal, being a joint and several obligor.

W. Jeffery by a series of irregular proceedings and by various contrivances amounting to fraud, in respect to the sequestrated estate, was found in arrear in his accounts to the amount of 1,000*l*.; and the Appellant, the trustee who succeeded him, put the bond in suit against Watson, who defended himself by accusing the commissioners of great neglect in their superintendence of Jeffery, of conniving at his misconduct, of concealing from him (Watson)

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the several matters which they knew, and of generally failing to discharge their duties under the Bankrupt Act towards the creditors, which the Respondent considers as also their duties towards him in his capacity of W. Jeffery's surety.

Almost all of these charges, in point of fact, are denied by the Appellants, the trustee, and the commissioners. They deny all knowledge or suspicion of Jeffery's frauds, which were indeed, for the most part, so cunningly devised as to escape even a pretty close scrutiny; they deny all *laches* or negligence in the discharge of their own office. They only admit that their meetings were not held as often or as regularly as the act directs; and they also allow, that a sum lodged in the Royal Bank by Jeffery, as the act requires, was with their privity and consent transferred to a Glasgow bank, of which one of themselves, a large creditor of the bankrupt, was a partner; but which was perfectly solvent, and by which no loss whatever has accrued to the estate.

Upon this latter fact admitted, I have to observe that it was most irregular in the commissioners to allow the transfer of the fund from one of the three banks expressly named in the statute, without the consent of their constituents, the creditors; and the more to be blamed, that one of themselves, or his banking-house, was to profit by the operation. Had any loss occurred by the proceeding, not only would Watson have been discharged from all liability in respect of it, but the commissioners would have been accountable for the whole amount of it to the body of the creditors at large. But no loss having occurred, and W. Jeffery having done no act of malversation or even of neglect, up to

the date of that transaction, I am clearly of opinion that Watson is not, at least by the transfer, discharged from his obligation in respect of Jeffery, as regards his subsequent proceedings.

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The Court below having assoilzied the Defender in respect of the neglect and irregular conduct of the commissioners, which their Lordships held to operate Watson's discharge, the present appeal is brought from that decree, and we are now to see upon what grounds it rests.

And first of all I have to remark, that here, as in so many of the Scotch cases, we find extremely little attention paid to the facts; hardly any care being taken to ascertain what these are by examining which of the statements on either side is admitted, and which denied, or not admitted, by the other. The matter of fact is thus too often passed over as of little moment, in order to get at the matter of law, on which all the pains both of the bar and the bench are bestowed. But on the fact every thing must depend; and it is to be noted in this case that the fact is assumed — assumed too all one way and against the Appellants in the face of their positive denial and in the absence of proof. The Court take for granted, that the commissioners acted with gross negligence in the performance of their duty, though this is denied; and they assume that out of their negligence arose the malversations of Jeffery, or the opportunities for committing them; opportunities which but for the *laches* of the commissioners, he could not have had; and yet not only is this denied, but upon all the circumstances, as they appear in the case, I really do not think even, morally speaking, and to say nothing of legal evidence, that the fact is so.

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But another thing, if possible still more important, has been equally overlooked, the frame of the bond itself, the whole ground of the action. The obligation is, "that W. Jeffery shall manage the estate, in all respects conform to the statute under which the sequestration was awarded," as well as that he shall "hold just compt and reckoning, and make payment to the creditors according to their several claims." Compt and reckoning for what? "for my whole management, receipts, and intromissions, as trustee with the whole estate."

Now the main reliance of the Respondent, and in which view the Court fully shared, is upon the supposed fact of the commissioners having been careless in calling on W. Jeffery to render accounts, and in other respects to perform his duty under the statute. They say that it was the office of the commissioners to see that he did perform his duty; that the cautioner, Watson, relied on their performing that office; and that their non-performance creates a case which he never contemplated, and to which his suretyship cannot apply. Was it of no moment to observe that the performance of the statutory duties by Jeffery was one of the very things for which the obligation bound his surety? Assuredly it is no argument against my being answerable for a man's doing a certain thing, that the party to whom I gave this obligation did not see that he did the thing. I had myself undertaken for his doing it; and it is no discharge of my voluntary obligation that the other party, the obligee, did not see to his proceedings. The statute and the bond in truth have the very object of giving the creditors a double security against malversa-

tion, the superintendence of the commissioners, and the obligation of the surety. The argument for the Respondents, and which has swayed the Court below, at once cuts off one of these securities, and leaves the creditors only protected by the other. The duty incumbent on the commissioners as a pledge to them continues; but that security they had without the bond, and I do not see how the bond can avail them at all, or why it was to be taken if this argument prevails.

The defective state of the facts in this case to support Watson's defences renders it unnecessary for me to enter upon many of the legal questions raised on little or no foundation, and discussed with no profit, because with no application to the case at bar. I may however observe, that very dangerous doctrines on suretyship obligations appear to be ventilated in some of the cases in Scotland (cases which have never been appealed to your Lordships). The language of the learned Judges is calculated perhaps to convey, as reported in the books, a meaning far stronger than their Lordships intended. They are really made to speak more of the obligee's duties than of the obligor's covenants—of the duties towards the surety which a person indemnified and guaranteed is bound to perform, rather than of the obligation which that surety has incurred towards him. A closer watch is thus kept over the conduct of the party who has taken an indemnity, than over the liability of him who has given it.

Now, that the obligee may by his conduct release a surety in certain cases, no one can doubt. The holder of a bill giving time to the acceptor discharges the indorser from his suretyship

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liability, even at law, and so in any other guarantee by simple contract ; and in equity the obligee in a specialty may do so, by giving time, or otherwise injuring the recourse of the surety or co-obligor ; and all this upon the ground that the surety has a right to stand in the place of the creditor, holder, obligee, or other party indemnified, and must not have his rights or equities voluntarily cut down by the acts of that party. But while at law the surety in a bond is not at all discharged, even by a long neglect of the obligee to demand payment or account from the principal ; nay, where the latter has become insolvent during the time thus suffered to elapse, as was decided in the *Trent Navigation Company v. Hardy*\* ; the Courts of Equity have never, to my knowledge, given a discharge to the surety merely on the ground of the creditor, the obligee, not having called on the debtor so early as he ought, or not having given early notice of his failure or non-payment to the surety. The case of Mr. Law, Mr. Tierney's surety in Calcutta, at the Rolls in 1799, gave rise to much discussion and an elaborate judgment by Lord Alvanley. It is reported 4 *Vesey*, 824 ; but there were other circumstances very different from such *laches* to govern that judgment, and especially the payment of a balance to the representatives of the debtor by the party's (East India Company's) servants, which was justly held to be an acknowledgment to the benefit whereof the surety was well entitled. It is however undeniable, that the Courts of Equity will look narrowly to every thing in the conduct of the obligee which has a direct tendency to wrong the surety, and worsen his rights and

\* 10 East, 34. See *Oakeley v. Pasheller*, antè, p. 548.

equities ; and will, as Lord Loughborough said in *Rees v. Berrington*, “ lay hold of such errors to release him.” The error however in the present case arises in supposing that any want of care on the party’s side in making the trustee do that which the surety had covenanted that he should do, was like a postponement of the surety’s equities, or diminution of his rights at law.

However, we need not discuss such questions in this case, nor deal with the English decision in *Vernon of Montague v. Tidcome* \*, which was that of a positive and express covenant given to the surety by the obligee. Neither are we called upon to dispute the doctrine of the Court below here laid down, and in *Main v. Hardy*, that where any one gives security for the conduct of another in a certain office which brings him in contact with persons also in the office, he has a right to expect that these persons will, in all things affecting the surety, conduct themselves according to law and discharge their duties. All this may be generally true, and yet it cannot avail to discharge a surety who has expressly bound himself for a person’s doing certain things, unless it can be shown that the party taking the security has, by his conduct, either prevented the things from being done, or connived at their omission, or enabled and clearly enabled the person to do what he ought not to have done, or leave undone what he ought to have done, and that but for such conduct this omission or commission would not have happened. The present is any thing rather than such a case. The facts are not here to ground any such conclusion, and therefore I am of opinion that the surety Robert Watson was not discharged.

\* 2 Vern. 518.

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I have, therefore, to move your Lordships, that the Decree appealed from be reversed ; and that you remit to the Court below, with instructions to decree, in terms of the second conclusion of the libelled summons, i. e. the conclusion relating to Watson, the only party here before your Lordships.

Judgment reversed.

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## SCOTLAND.

(COURT OF SESSION.)

SWAN - - - *Appellant;*

The GOVERNOR and COMPANY of }  
the BANK of SCOTLAND - } *Respondent.*

M. with S. and others, were joint obligors in a bond conditioned to answer for any balance which might become due from M. to a bank in Scotland, with whom he had obtained a credit according to the Scotch system of banking. M. in the course of his dealings, drew upon the bank by written orders for sums made payable to bearer, and issued at a place more than ten miles distant from the bank; but dated (contrary to the fact) at a place within that distance, and also post dated; being in both respects contrary to the statute 55 Geo. 3. c. 184. s. 13. which not only imposes a penalty upon the parties to such drafts, but makes the transaction void. The mode of drawing was known by the bankers. M. having over-drawn the bank to the amount of 4,378*l.*; an action upon the bond was brought against S. by the bank, to recover the amount. Held that no debt had been incurred, and therefore that the parties were not liable upon the bond.

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*LORD BROUGHAM.* — The Scottish banks, both public and private, have for more than a century past been in the practice of granting accommodation to their customers by way of what is called *cash credits*—a mode of conducting business which may almost be said to have become classical from the description and commendation given of it by Mr. Hume, in one of his most celebrated poli-



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tical essays. It consists in the opening an account to a certain limited amount with the customer on his finding good security for any balance which may at any time of settlement be found due. Upon this credit he operates by drafts on the bank, and these are honoured up to the specified amount during the whole period of the party's occasion for this accommodation. Interest is charged on the sums drawn, and thus the party only pays for what he actually uses, while he runs no risk of keeping money by him beyond the occasions of the day; and the bank runs little or no risk, because, beside the surety's liability, it has constant means of knowing the nature of the customer's dealings, and of inferring from thence the state of his circumstances.

These credits are used not only by traders, but by persons in any other occupation or profession requiring supplies of money to a moderate amount, as cattle-dealers, agents, and writers; and sometimes even by private individuals living on their means.

W. Martin, writer, of Lockerbie, obtained a credit of this description with the Bank of Scotland, in June, 1819, and gave a bond for securing the latter, in which he was joined by Mr. Swan, the present Appellant, and others, formally and nominally as principal co-obligors, but, in reality, as his sureties. In September, 1825, this was extended to 10,000*l.*, and the sureties joined in a second bond, whereby they became liable in the same manner with W. Martin, but to the extent of 5,000*l.* for "all such money as should be drawn out from "the said bank, or its agency-office at Dumfries, "or as may be resting over, due, paid, payable, or

“ claimable, on any drafts, orders, bills, notes, receipts, guarantees, letters, documents, or obligations whatever, drawn, accepted, granted, indorsed, or any how signed by W. Martin, or by procuration, or liable on him by any legal construction, and chargeable to the said account.”

And it was further stipulated by the bank, that any account or certificate signed by their principal accountant, or by their agent at Dumfries, should be sufficient to ascertain, specify, and constitute the sums or balance to be due on principal and interest, and should warrant all execution of law against the obligors, jointly and severally, for such sums and balances.”

W. Martin continued to operate upon this credit until he became insolvent, and was sequestered, when a balance of 4,378*l.* 0*s.* 11*d.* principal, and 326*l.* 10*s.* 2*d.* interest, was due upon the account. The sureties or cautioners were sued upon the bond, and it was stated in the defence that the manner of drawing had been chiefly in two ways. W. M. had sometimes sent letters from Lockerbie, where he resided, to the bank agent at Dumfries, directing him to send him money to a specified amount by the bearer; and sometimes he had discounted bills, and entered into other transactions with various persons at Lockerbie, and given them drafts on the bank, or bank agent. In order to save the stamp, it is alleged, he made them payable to bearer; but as Lockerbie is said to be beyond the distance of ten miles, then specified by the stamp act, he dated the cheques at Dumfries, and generally post-dated them, as if drawn the day when the holders might present them for payment at the bank office.

Dockets and balances certified by both the ac-

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countant and agent were regularly made and produced, and the cause was reported upon cases by the Lord Ordinary to the Lords of the second division, who directed a hearing in presence, and then decided that the suit being brought only on the second bond, that of 1825, the pursuer could not recover on the bond of 1819 in this action; but their Lordships decreed in his favour upon the former instrument.

Nothing here turns upon the form of the action, which was a suspension of a charge given by the bank on the bond. The matters before stated as to the transaction were averred, and the facts alleged by the parties being in many, indeed in most, particulars, denied on either side, nothing is to be taken for concluded or ascertained by the proceedings; but the Respondents, the chargers, were sufficiently confident in their grounds of law to let the case be determined upon the foot of admitting, for argument's sake, the allegations of the Appellants, the suspenders. And as it was on this assumption that the Court decided, so it is upon this that the appeal is brought, and that your Lordships are called upon to determine here.

It is to be regretted that some steps had not been taken to ascertain the facts; the more especially as the matter of law was, in the estimation of the Court below, sufficiently difficult to require cases and a hearing in presence. It does not seem that any difficulty could have attended this settlement of the facts, for nothing material was in dispute except the fact of the draughts having been such as the Appellants contend they were—namely, payable at Dumfries, and drawn at Lockerbie—of their having been issued to parties whom W. Martin

was paying money to — of Lockerbie being beyond the legal distance — and of the bank agents being aware of all this — facts, in all likelihood, only denied for form's sake, and which probably would have been admitted, or at least, if denied, easily substantiated. What part of the balance was made up of money obtained on such drafts, and what part of money obtained on letters sent for cash to be transmitted from Dumfries, by W. Martin's messenger, could probably have been ascertained with equal ease; — and these are the only facts in the case. The consequence of settling these things would have been that, should the point of law be decided against the Respondents, the cause would have been at an end: whereas if your Lordships reverse this decision, a new litigation will be necessary in case the chargers deny the suspenders' allegations. However, we have to deal with the case as it is now before us; and I regret to find that I cannot come to the conclusion at which the learned Judges below have arrived. On the contrary, I really hold it to be, without any reasonable doubt, clear, that upon the facts which the case for the Respondents assumes to be those of the cause, the bank could not recover upon this bond.

The whole question arises out of, and turns upon the Stamp Act 55 Geo. III., c. 184, sec. 13; and we may at once lay out of view all that portion of the alleged balance or debt which arose from letters or orders such as those set forth in the cases, namely, directions given at Lockerbie in writing to the bank agent to send W. Martin sums of money. I do not consider that these are drafts or orders for the payment of money at all. They are directions to send money to the party who either has it in the

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bank, or takes it on credit from the bank ;—they are not negotiable instruments, and they are not issued. Therefore they do not come within the description of instruments requiring a stamp, and they do not fall in any way within the provisions of the 13th section. But we are to consider the point argued and decided below—whether or not, upon a balance arising out of sums paid by the bank to the bearers of unstamped cheques issued at Lockerbie, beyond the privileged distance, the agent who honoured those cheques being conusant of the distance and place of issue, the co-obligors or sureties in W. Martin's bond of 1825, were liable to make good W. M.'s deficiency, in other words, to pay the debt found due, and arising out of such dealing.

Now it must first of all be observed that it seems mainly though not exclusively to be the ground upon which the Respondent rests his case, and the Court below their judgment, that the bondsmen had bound themselves by the certificate of the accountant or agent of the bank, and that whatever balance those persons should certify was to be regarded as the true balance for which they were liable to the bank. This argument seems to admit that, but for such a special provision between the parties, the want of a stamp would be fatal. But certainly something has been said of a more general nature respecting the difference between enactments for protecting the revenue, and other statutory provisions. We shall therefore begin by considering the question in its more general shape, and then inquire if the special obligation just adverted to makes any difference in the present case.

1. There seems no reason at all to doubt that if, for the purpose of protecting the revenue, any-

thing is forbidden to be done under a penalty, this does not necessarily make void the thing done, or prevent a right of action from arising out of it: thus, if dealing in tobacco without a licence, as in *Johnson v. Hudson*,\* is prohibited under a penalty, this will not prevent the person who so deals from maintaining an action for goods sold and delivered in such dealing, although the unlicensed dealer will be liable to the statutory penalty. But how would it have been if the legislature had, besides the penalty, provided that all dealing of the forbidden kind should be absolutely void? It is clear that, in this case, no action could arise from such void dealing, not because the law forbade the transaction for revenue purposes, but because it deprived the transaction of all legal force and effect by making it void; and even if it had only been forbidden, with or without penalty, provided the prohibition was for other than revenue purposes, no action could arise. Where there was no provision avoiding the transaction, but a prohibition framed to protect the buyer, an action was held not to lie when that prohibition was disobeyed. *Law v. Hodgson*†. So no action was held maintainable for printer's work where the act requiring the printer's name to be given had not been complied with—the not following a direction being held equivalent to disobeying a prohibition. *Bensley v. Bignold*.‡

But a provision making void the transaction is quite as clear a ground of nullity, and quite as strong to defeat all legal remedy as any such prohibition. Be it so, that the provision is to protect

\* 11 East, 180.

† 11 East, 300.

‡ 5 B. & A. 335.

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the revenue, still if it operates not by penalty, nor yet by mere prohibition, but by declaring void what is prohibited, surely this is as immediate and direct a defeasance of all legal remedy as can be conceived. It is not as in *Laro v. Hodgson*, a consequence drawn by argument from the statutory enactment, but it is the very enactment itself. It stands in the place of penalty. It is in truth the penalty denounced. The wrong-doer, the person breaking the law, forfeits 100*L.*, and forfeits also the validity of his contract. He incurs two penalties, the fine and the nullity.

Now what does the Stamp Act provide with reference to the present case? The 13th section is precise. "And for the more effectually preventing of frauds and evasions of the duties hereby granted on the bills of exchange, drafts, or orders for the payment of money under colour of exemption in favour of drafts or orders upon bankers, or persons acting as bankers, contained in the schedule hereunto annexed; be it further enacted, that if any person or persons shall, after the 31st day of August, 1815, *make and issue*, or cause to be made and issued, any bill, draft, or order for the payment of money to the bearer on demand upon any banker or bankers, or any person or persons acting as a banker or bankers, which shall be dated on any day subsequent to the day on which it shall be issued, or which shall not truly specify and express the place where it shall be issued, or which shall not, in every respect, fall within the said exemption, unless the same shall be duly stamped as a bill of exchange according to this act, the person or persons so offending shall for every such bill, draft, or order, forfeit the sum of 100*L.* And if

“ any person or persons shall knowingly receive or  
 “ take any such bill, draft, or order in payment of,  
 “ or as a security for, the sum therein mentioned,  
 “ he, she, or they, shall, for every such bill, draft,  
 “ or order, forfeit the sum of 20*l*. And if any  
 “ banker or bankers, or any person or persons act-  
 “ ing as a banker, upon whom such bill, draft, or  
 “ order shall be drawn, shall pay, or cause, or permit  
 “ to be paid the sum of money therein expressed,  
 “ or any part thereof, knowing the same to be  
 “ post-dated, or knowing that the place where it  
 “ was issued is not truly specified, and set forth  
 “ therein, or knowing that the same does not in  
 “ any other respect fall within the said exemption,  
 “ then the banker or bankers, or person or persons  
 “ so offending, shall, for every such bill, draft, or  
 “ order, forfeit the sum of 100*l*.” Thus far all  
 is description and penalty and statement of the  
 purpose, viz., to prevent frauds and evasion of the  
 duties. But there follows a clear declaration of  
 nullity or avoidance, for it goes on to provide that  
 “ *moreover*,” that is, over and above forfeiting the  
 penalty, the banker or other person shall “ not be  
 “ allowed the money so paid, or any other part  
 “ thereof, in account against the person or persons  
 “ by or from whom such bill, draft, or order, shall  
 “ be drawn, or his, her, or their executors or ad-  
 “ ministrators, or his, or her, or their assignees, or  
 “ creditors in case of bankruptcy or insolvency, or  
 “ any other person or persons claiming under her,  
 “ him, or them.”

To say that a party shall not be allowed in  
 account any money paid in a particular way, is  
 equivalent to saying that the party shall have  
 no claim against the payee or person on whose

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account or for whose behoof the money was paid, or, in other words, that no credit should arise to the party, and, which is the same thing, no debt should be incurred towards him by the other person. The statute has therefore in terms said that no debt shall arise from dealings contrary to the stamp provisions, and in all but express terms that whatever is done shall be void *quoad* creating a demand or claim by the party paying against the party receiving. This is any thing, then, rather than a mere penalty protecting the fiscal regulation, or a mere prohibition with a view to such protection. It is a further and an additional protection given to the stamp revenue, by declaring that payments upon unstamped instruments made by parties knowing that the instruments do not come within the exemption shall not be valid to the effect of charging the payee with a debt to the party paying.

2. Now what is the ground of the bank's action, — of the charge given against W. Martin's co-obligors, or sureties? It is the debt alleged to be due from him to the bank, in respect of his drafts upon the bank agent, honoured by him at Dumfries. But if no debt is due, if the wrong-doer is forbidden from having any claims against his customer in account, there is no liability incurred by the co-obligors, or indeed by W. Martin himself. That is the immediate and direct consequence of the statutory provision. It is as if the statute had made void the bond to secure the balance from time to time due; for if there is nothing due, no balance, the obligation to make that nothing good amounts itself to nothing. The operation of banking is this: We speak of deposits by customers, and of their keeping money at a banker's; but, both

in fact, and in contemplation of law, they give their money, or securities for money, to the banker, who becomes their debtor, and is bound to repay it on demand. So the operation of a cash credit is the reverse of this. The customer becomes the debtor to the bank by so much as the bank advances on his drafts, and the surety becomes bound to pay that debt if the customer fails. Then if the statute says no debts shall arise or become due upon money drawn out by the customer, or paid by the banker in a particular way, it also says that no bondsman shall be liable on such a security given. It is as if the cash credit stood, and the bond for securing the balances stood, but nothing had been done under the credit, and so no balance had arisen, or could arise, which the bondsman could have to make good.

But the peculiar form of the bond is relied upon. It is said, that whatever the accountant or agent should certify as the balance is to be taken as that balance. How can this alter the case? They are to ascertain the quantum; the quantum of what? Of balance or debt due to the bank. But the act of parliament has said, that there can out of transactions of this kind arise no debt whatever. Then there is no balance of a debt for the certifier to ascertain. The words taken even most literally will not bear out the contention of the Respondents. "Any account or certificate, signed as provided, shall be sufficient to ascertain, specify, and constitute" — What? Not how much the obligors shall be bound to make good or pay, but "the sums or balances, *such as aforesaid*, to be due *hereon* in principal and interest, and shall warrant all executorial for *such sums or balances*."

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Now what are *balances such as aforesaid*? They are plainly balances in the transactions aforesaid, the drawing money out and paying it in—in a word, the balance of debt due from Mr. Martin to the bank: and how are they further described?—as “*to be due hereon* in principal and interest.” This plainly means,—due on this bond by reason of the claims arising to the bank for money advanced on W. Martin’s cash credit. So that the obligation is to pay the balance or debt arising and due. If there is no debt, no claim, there is no obligation. The statute has taken away the debt and the obligation vanishes with it.

It is quite impossible to avoid regarding what it is that constitutes the obligation in the instrument, what is the main purpose of it, and to which all besides is accessory and ancillary. It is, that the obligors are bound to pay any debt incurred by Mr. Martin to the bank on his cash credit. Now if there could be no debt, there must be an end of the obligation to pay.

Nothing can be more plain than that if such decisions as the present could be supported, the 13th section of the statute would become at once a dead letter, as far as the nullity goes. Parties would only have to frame their securities like these bonds of June, 1819, and September, 1825, and then the unstamped cheques would constitute a balance available to the one party and payable by the other. For then it would always be contended, and with success, that the party was not suing for money paid by unstamped drafts,—*that* would be admitted to be impossible by virtue of the 13th section,—but he would be represented as suing on the balance declared by the account, and the par-

ties would thus be concluded, and the Court precluded from going into the fraudulent and illegal dealing which had rendered the whole transaction void by prohibiting any claim or debt from arising out of it. All drafts, whether within 10 or beyond 400 miles, whether payable to bearer or not, whether on demand, at sight, or at six, or twelve, or eighteen months date, would become valid, because a single bond executed would make the party drawing and receiving liable; without even paying for a bond stamp, a written memorandum agreeing to pay, and with an agreement stamp, and that only affixed to it when it was to be put in suit, would suffice to legalize the whole transaction. As far as efficiency in law and equity is concerned, the statutory protection to the revenue of the nullity declared would be gone and the penalty alone remain.

A recent case in the Exchequer, *Owens v. Denton* \*, was relied on for the Respondent. But it is in no respect repugnant to the opinion which I have been giving. There, a settlement of accounts had taken place upon a selling of malt by an illegal measure. The Court admitted explicitly that such a sale could not either be enforced by action or set off in defence against a claim, but they held that the settlement was equivalent to payment, and could thus be set off. It is quite unnecessary to say whether this was or not a correct view of the law, and whether it let in or not plain evasion of the revenue. At all events, it does in no way conflict with the grounds of the present case, which stand wholly separate and apart.

I am therefore of opinion, that the interlocutors

\* 1 Compton & Roscoe, 711.



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appealed from must be reversed, and that the case must be remitted with a declaration to this effect : That no obligation arises upon this bond to pay any balance alleged to be due to the bank on Mr. Martin's drafts, in so far as these were drawn and issued beyond the statutory distance, or wrong dated in point of time or place, and were known by the agent of the bank to be drawn beyond such distance, or to be wrong dated in point of place, or to be wrong dated in point of time ; and in so far the Court will be directed to suspend the charge, and to find expenses due according to the result of the inquiry touching the manner in which the balance is constituted.

Judgment reversed.

# I N D E X.

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## ADEMPITION.

W. L., by will dated in 1772, devised all his lands, subject to a term of 1,000 years, to his brother J. L. for life, remainder to W. H. L., son of J. L., in tail. The trusts of the term were to raise 15,000*l.* in augmentation of the portions of his nephew R. and his nieces J. D. and S. M. A. L. daughters of J. L., to be divided equally between them. The life estate having vested in J. L., he by his will dated in 1788, gave to his daughter J. D. a sum of 10,000*l.* He also gave in trust for his daughter S. M. A. L. 10,000*l.*, half to be paid three years after his death, and the remaining half six years after his death, with interest at 4 per cent. from the time of his death, unless his son W. H. L. should choose to pay the same sooner; the interest of this legacy to be paid to his said daughter during her life, and after her decease to pay the principal among her children, according to her appointment, &c.; and by the will it was declared that the legacy of 10,000*l.* so given in trust for his daughters, was over and above the legacies of 5,000*l.* given to them by the will of his brother W. L., and subject to the charge of legacies, &c., he gave all his freehold estate, &c. to W. H. L. for life; remainder to his first and other sons, &c. in tail.

By articles of agreement made upon the marriage of S. M. A. L., and dated 1790, J. L. agreed to give to J. W., the intended husband, 15,000*l.* as her marriage portion; in consideration of which, J. W. agreed to make provision for pin money, jointure, and portions for the wife and the children of the marriage by a settlement to be thereafter executed; and it was agreed and declared that the portion of 15,000*l.* was in full satisfaction and discharge of all sums of money which S. M. A. L. was entitled to, or could claim by virtue of any gift, bequest, or devise under the will of W. L. The marriage having been solemnised, a settlement pursuant to the articles was executed in

1793, and 15,000*l.*, the marriage portion, was paid by J. L. to J. W.

In 1794, J. L. died, and his will, having been proved by W. H. L. his sole executor, was read in the presence of many members of the family, and, among others, the trustees of the marriage articles and settlement. In 1795, W. H. L. made his will, and died in 1797, when the Appellant became, under the wills of W. L. and J. L., tenant in tail of the lands, &c. charged by the will of J. L. with the legacy of 10,000*l.* in favour of S. M. A. L. In 1826, for the first time, J. W. and his wife (S. M. A. L.) claimed the said legacy to be paid with interest according to the trusts created by the will of J. L., and, in 1829, filed a bill in Chancery against the Appellant and others to compel the payment. In 1832, a decree was made by the Vice-Chancellor according to the prayer of the bill, and in 1835, this decree was affirmed by the Lord Chancellor. But on appeal to parliament the decree was reversed on the ground that the settlement was an ademption and satisfaction of the legacy.—*E. Durham v. Wharton* - - - p. 526

**ADVOUSON.** See EVIDENCE.

#### **ANNUITY.**

By deeds, executed in 1800, C. conveyed to J., subject to a mortgage, lands at T., to secure two annuities of 300*l.*, in consideration of two sums of 2,000*l.* The deeds contained powers to repurchase by C., upon giving twelve months' notice in writing under his hand. In 1812 C. agreed to sell to B., who agreed to purchase for 95,000*l.* the lands at T., subject to the incumbrances; and B. entered into possession of the premises under the agreement, and paid the annuities to J.

In 1818 C. granted all his lands, &c. to J. and his heirs in trust, to sell and pay off the charges and incumbrances affecting the same. In 1824 C. agreed to give to J. a charge upon all the premises contracted to be sold to B., and the purchase-money to secure the payment of arrears of the annuities and interest thereon, and other claims of J.; and an account having been stated and settled between C. and J., by a deed executed in April, 1824, C. assigned to J. the balance due from B. in respect of the purchase-money, 95,000*l.* and interest under the contract, subject to previous incumbrances, to be applied in payment of the amount found due to J., upon the account. In 1825 B. filed a bill in chancery

stating the agreement for purchase, the annuity deeds containing the power to repurchase, a treaty between him and J. for an immediate repurchase of the annuities, on failure of which, as it was alleged by the bill, he requested C., in performance of his agreement, to give J. such notice as was required by the annuity deeds, to enable C., or B. in his place, to repurchase the annuities, and that such notice was accordingly reduced into writing, and delivered to J., on behalf of C., on the 16th of April, 1823; that on the day mentioned in the notice the solicitors of B. and C. went to the residence of J. for the purpose of tendering to J. 4,000*l.*, with all arrears of annuities and costs, and the deeds of transfer for execution; and, upon being informed that J. was absent from home, left a notice that the money and deeds were deposited at the house of the solicitors. The bill charged that J. claimed, but was not entitled to, interest upon the arrears of the annuities, and prayed against C. a specific performance, and against J. a declaration that the annuities had ceased according to the notice, with accounts, &c.

J. by his answer admitted the annuity deeds, and the contract between C. and B., and said that a notice signed "W. C.," by his attorneys E. and H., was served on him, J., but protested against the authority of E. and H. to interfere in the concerns of C., he, J., having previously received from C. an irrevocable power to act in the management and settlement of his affairs; and J. submitted that the notice was irregular and of no avail, not being in compliance with the terms of the annuity deed; and that after the notice had been given, and before the time limited therein had expired, C. had settled his accounts with J., admitting that the notice was not available, and treating the same as of no effect, and executed to J. an assignment of all the right and interest of C. in the purchase-money due from B. (under his contract with C.), for securing to J. the amount due to him on the said settlement of accounts, which was notified to B., and in consequence thereof no tender was made to J.

No witnesses were examined on behalf of B. the plaintiff in the suit; but the documents and principal facts stated in the answer of J. were proved by witnesses. The cause was heard before the Vice-Chancellor and a decree pronounced, declaring that the annuities ceased from



the date of the notice, with directions consequent thereon, and this decree was affirmed by the Lord Chancellor on appeal; but upon further appeal to parliament the judgment was reversed, principally on the ground of defect in the proof of the notice, and that it contained no assignment of any place for the payment of the money, in which respect the proviso for repurchase in the grant was also defective. — *Joy v. Birch* - p. 201

**APPENDENCY.** *See EVIDENCE. TITHES.*

**ASSETS.** *See DISCHARGE.*

**BANKERS' CHECK.** *See DISCHARGE, 3.*

**CHURCH.** *See EVIDENCE.*

**CONSTRUCTION.** *See EVIDENCE. TITHES.*

**CONTRACT, AVOIDANCE OF.** *See DISCHARGE, 3.*

**COSTS.** *See TRUST.*

**CROWN.** *See EVIDENCE. TITHES.*

**CURRENCY.** *See WORDS.*

**CUSTODY OF DOCUMENTS.** *See EVIDENCE.*

**DEBTOR AND CREDITOR.** *See DISCHARGE.*

**DESCENT.** *See DIGNITY.*

Upon reference of a peerage claim to a committee of privileges of the House of Lords, the following facts appeared: —

Richard le Fleming having accompanied Sir Hugh de Lacy to Ireland in the reign of Henry II., obtained a grant of the lands of Slane, in the palatine honour of Meath, of which Sir Hugh possessed the regalities; and Richard and his heirs and successors, tenants of the lands, were in ancient records styled Barons of Slane. In 3 Edw. 2. Baldwyn, Baron of Slane, was summoned to the parliament held at Kilkenny by writ directed Baldwyno le Fleming. After a succession of four peers of the family, who sat in parliaments during the reigns of Edw. 3., Hen. 4., and Hen. 6., Christopher, the fifth peer, died a bachelor, leaving two sisters; whereupon the lands of Slane went to David, his uncle of the half blood, who sat in parliament under a writ of summons, 2 Edw. 4. (1462), with the precedence of the old peerage. He was succeeded by his son Thomas, who died without issue, in 1471, leaving three sisters; whereupon the lands of Slane, with the other estates, went to his cousin James Fleming, his male heir, who was summoned to and sat in parliament in the reigns of Edw. 4. and Rich. 3. He was succeeded by Christopher, his son (1491), who sat in parliament 9 Hen. 7. He was succeeded (9 Hen. 8.)

by his son James, who sat in parliament 41 Hen. 8., and died without issue, in 1577, leaving two sisters; whereupon the lands of Slane, &c. went to Thomas, his cousin and heir male. He was summoned to and sat in parliament 27 Eliz.; and from him, by descent through a female, George Bryan claimed the barony of Slane, as heir general of the three last of the Barons Slane, summoned by writ and sitting in parliament, upon the grounds that in the several instances where the male line failed, the dignity was in abeyance between the female heirs, and that the summonses and writs in those several instances operated as new creations of peerage, or as determinations of the several abeyances in favour of the party summoned, and constituted peerages in fee.

James Fleming claimed the peerage as heir male of Randall Lord Slane; he appeared by counsel only to oppose the claim of Mr. Bryan, not proceeding upon his own claim: The committee were of opinion and reported that Mr. Bryan had not established his claim.

*Slane Peerage Case* - - - p. 1

#### DISCHARGE.

1. In 1810, R. and S., who carried on business in co-partnership under the firm of R. and Co., borrowed of O., the father-in-law of R., 10,000*l.*, for which sum O. accepted four bills drawn by R. and S. in the name of their firm; and to secure the repayment of the moneys which should be paid by O. upon the acceptances, R. and S. in 1811 and 1812, executed to O. four joint and several bonds in the penal sums of 5,000*l.* each, with conditions to be void, if R. and S., their heirs, &c. should pay to O., his executors, &c. as to two of the bonds on or before the 15th of October, 1817, and as to the remaining two of the bonds on or before the 15th of January, 1818, all such sums of money as O., his executors, &c. should have paid on account of the bills, with interest, &c. The amount due upon the bills was afterwards paid by O., to whom credit in account for 10,000*l.* was given by R. and S., and the interest paid thereon.

In November, 1814, S. died, having made his will and appointed executors. In May, 1815, according to a provision in the articles of partnership, the accounts were made up, the stock, &c. valued, and the partnership dissolved, of which notice was given in the London Gazette; and shortly afterwards R. contracted a new partnership

with K., another son-in-law of O., which was carried on and continued in the firm of R. and Co.

In June, 1815, a deed between the executors of S. and R. and K, his new partner was executed, by which it was recited that it had been agreed, that R, should be intitled to all the outstanding debts and effects of the late firm of R. and S. upon paying to the executors of S. 3,065*l*., and securing the further payment of 49,622*l*. with interest from the 1st of May last, and indemnifying them against all outstanding debts and engagements of the firm specified in a schedule; and thereupon R. covenanted to assign the debts of the old firm to trustees to secure the payment of promissory notes given by R. and K. to the executors of S.; and R. and K. covenanted to execute and deliver to the executors of S. a bond in the penalty of 150,000*l*. conditioned for the payment of the outstanding debts of the old firm of R. and Co., and to indemnify the executors against all claims. Among the debts contained in the schedule, was the one due to O. of 10,000*l*. The sums as stipulated by the deed, were afterwards paid to the executors, and R. and K. carried on the business in partnership under the name of the old firm, from that time until 1826, delivering accounts annually to O., in which they credited him with the debt of 10,000*l*., and paid the interest upon it, with which he was debited in the accounts. These accounts included, also, and without distinction, a loan of 17,000*l*. stock, which had been made by O. to R. and K., with the dividends thereon, and payments made in respect of the dividends.

In 1817. O. agreed with R. and K. to leave the 10,000*l*. in their hands for three years longer. Towards the expiration of this term of three years, O., in a letter dated in 1820, addressed to R. and K., expressed himself as follows: "The bonds of the house which were granted to me in 1811 and 1812, payable in six years, and the payment of which was suspended for three years longer, in consequence of my engagement in 1817, will be come due on the 15th of October and 15th January next, at which period I hope it will be convenient to the house to discharge them." Upon application by R. and K. for further time, O., by letter on the 5th of October, 1820, replied, "that it would not be convenient to him to enter into any new engagement for continuing the advance of 10,000*l*. beyond the term of

"his former agreement." But upon a renewed application, O., by letter on the 14th October, 1820, after noticing a proposal made on behalf of his son (a clerk in the house of R. and K.) says, "I shall be happy to wait "twelve months (the time you require) in order to receive such a proposal," &c. It appeared also by the correspondence that the firm of R. and K. were occasionally under pecuniary embarrassment.

In 1823, O. having required further security for his debt, it was suggested by his solicitor, that notice should be given to the executors of S.; but upon the representation of R. and K., that such notice would have the effect of bringing an immediate demand upon them, and an opinion given by counsel, that the taking a collateral security from R. and K., provided no further time were given to them, would not discharge the estate of S., the security was effected accordingly on the 18th December, 1823, and no notice was given.

In 1826, R. died, not leaving, as his executors alleged, assets to pay his debts. K. also alleged that he was unable to pay it. Under these circumstances, held that the estate of S. was discharged. — *Oakeley v. Pasheller*

p. 548

2. A. was bound jointly with B., the trustee of a bankrupt estate in Scotland, to the extent of 1,000*l*. The condition of the bond was that B. should faithfully discharge his office, account, &c. The creditors of the bankrupt, according to the practice in Scotland, chose their commissioners to act for them, and superintend the proceedings of the trustee. B. by various contrivances amounting to fraud against the estate, was found in arrear to the amount of 1,000*l*. Whereupon the bond being put in suit against A., he pleaded that the commissioners by neglect and connivance, had caused and permitted the default, on knowing it had concealed it from him. Of this imputation there was no distinct proof. It was held that even on that supposition A. was not discharged. — *M'Taggart v. Watson* - p. 618
3. M. with S. and others, were joint obligors in a bond conditioned to answer for any balance which might become due from M. to a bank in Scotland, with whom he had obtained a credit, according to the Scotch system of banking. M. in the course of his dealings, drew upon the bank by written orders for sums made payable to

bearer, and issued at a place more than ten miles distant from the bank ; but dated contrary to the fact, at a place within that distance, and also post dated ; being in both respects contrary to the statute 55 Geo. 3. c. 184. s. 13. which not only imposes a penalty upon the parties to such drafts, but makes the transaction void. The mode of drawing was known by the bankers. M. having overdrawn the bank to the amount of 4,378*l.* ; an action upon the bond was brought against S. by the bank, to recover the amount. Held that no debt had been incurred, and therefore that the parties were not liable upon the bond.  
— *Swan v. Bank of Scotland* - - - p. 627

**EQUITY.** See DISCHARGE.

**EVIDENCE.**

Upon a bill of exceptions to the admission and rejection of evidence and the directions of the judge, the following points were decided on a writ of error : —

1. In *Quare impedit*, to recover the presentation to the church of K., the advowson whereof was claimed to be part of the temporalities of the Bishop of M., the following documents were produced in evidence, viz., a deed, dated in 1637, granting to D. the next avoidance of the church of K., and a case dated in 1695, stated for the opinion of counsel, on the part of A., then Bishop of M., containing a statement that in 1637 C. granted to D., then incumbent of the church of K., the next presentation thereto ; and that in 1642 both rectory and vicarage being void by the death of D., his widow and executrix presented *pro hdc vice* B. to both, who was instituted by the Bishop, and inducted by his successor. The deed and case were found by W. among books which W. stated to be visitation books and other papers of the diocese of M., in a house inhabited by a person of the same family name as A., Bishop of M., and which was stated in evidence to be the family house of A., and where his papers were kept. The documents so found were handed by W. to S., who delivered them over to C., by whom they were produced. C. was a descendant of Bishop A., but had never seen these documents in the house, nor any papers of the family, or relating to the diocese. The proofs as to the custody being in some respects equivocal, on the examination in chief, were so left without cross-examination. It was proved that there was no registry of ecclesiastical or other records in the registry office of the diocese of M. anterior to 1717.

Held that the deed and case were admissible in evidence on behalf of the Plaintiff, against a successor of the Bishop in the see of M.

2. By letters patent 9 Edw. 4., the advowson of the rectory and vicarage of K. was granted to W. Bishop of M. and his successors. By an act of parliament 10 Hen. 7., reciting the necessity of protecting the King's subjects in Ireland, and reducing the land to obedience, and the diminution of the revenues by improvident grants, "to divers persons, such as for the most part do full little service to the common weal, for lack of which revenues the land could not be defended for the destruction of the Irish enemies," it was enacted that all manors, &c., advowsons of churches, &c., whereof the King or any of his progenitors Kings of England were at any time seised in fee simple or fee tail, from the last day of the reign of Edw. 2. to this present act, &c., by any letters patent under the great seal of England or Ireland, to any person or persons, by whatsoever name, &c., be resumed, revoked, annulled and deemed void, and of none effect, &c. But the manor of R. was, by a document annexed to the act, excepted.

Held that the grant of Edw. 4. was avoided by the act of Hen. 7., and that the advowson was by the statute re-appended to the manor.

3. To a count in the declaration in *Quare impedit* stating the title of the Plaintiff, and that the advowson was appendant to the manor of R., the Bishop by his pleas asserted a seisin of the advowson in gross in right of his see, and traversed the appendancy of the advowson to the manor, and the title of the Plaintiff. The clerk's pleas were in substance the same. On these pleas, issue being joined, a fine levied by B., in respect of whose estate the Plaintiff's claim is not admissible in evidence upon such issue, and, if received, ought not to be left to the jury to say whether it barred the action of *Quare impedit*; and held, that it did not bar the action.

— *Bishop of Meath v. Marquis of Winchester* - p. 330

IRELAND. See WORDS.

LEGACY. See ADEMPMENT.

NOTICE. See ANNUITY. DISCHARGE.

ORDER FOR PAYMENT OF MONEY. See DISCHARGE, 3.

PARTNERSHIP ESTATE. See DISCHARGE.

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PENALTY. See DISCHARGE.

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**PEERAGE.** *See* DIGNITY.  
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**STAMP.** *See* DISCHARGE, 3.  
**STATUTE 55 G. 3. c. 184.** *See* DISCHARGE, 3.  
**STERLING.** *See* WORDS.  
**SURETY.** *See* DISCHARGE.  
**TITHES.**

By a charter of Hen. I., Reading, Chelsea, and Leominster, with their appurtenances, churches, and chapels, oblations and tithes, were granted to the abbot and convent of Reading. The church or rectory of Eye, was an appendage to the church of St. Peter, Leominster, comprehending the vicarage of Eye, and the manor and township of Lucton, which was part of the lordship of Leominster. Upon the attainder of the abbot of Reading, 30th Hen. 8., the abbey was dissolved, and the possessions of the abbey and convent, including the church and rectory of Eye, with all tithes thereto belonging, vested in the crown.

By letters patent of 10th James I., the king granted to M. and P. in fee, "All those our tithes yearly, and from time to time, coming, growing, or renewing," in Lucton, &c. and in the manor of Lucton, &c. including tithes of hay of &c. (particular lands, specified as being in the occupation of tenants named), and all tithes of lands in Lucton, in the occupation of, &c., all which are within the lordship of Leominster, and were formerly parcel of the possessions of the late cell or priory of Leominster, being a cell annexed to the late monastery of Reading, excepting advowsons of rectories, &c.; to hold the aforesaid rectories, tithes, &c. From the time when the possessions of the abbey had vested in the crown leases had been from time to time granted of the tithes of Lucton, but no mention was made in these leases of the rectory of Eye.

The occupiers of lands in Lucton paid to the grantees and those who claimed under them tithes of corn and grain, and every other species of tithe, except of hay and agist-

ment, the right to which they disputed, on the ground that the grantees were not to be considered as rectors of Eye, but as grantees of portions of tithes; that in the minister's accounts detached portions only of tithes were stated, and not the tithes generally of the rectory of Eye; and that tithes of hay and agistment had never within memory been paid in respect of such lands, and that it ought to be presumed, that there had at some time been a conveyance of those tithes to the owners of the lands. On the other hand, it was proved, that there had been various suits on behalf of the grantees demanding all the tithes, and decrees in some of those suits against the occupiers, who did not set up the defence of exemption from the tithes of hay and agistment. It also appeared, that the grantees under the crown had repaired the chancel of the parish church.

Held under these circumstances, that although it might be doubtful upon the construction of the grant, whether it passed the rectory, yet that it was sufficient to carry all tithes; that the grantees were intitled to the common presumption in favour of rectors, and that a grant of the tithes of hay and agistment, could not be presumed in favour of the occupiers.—*Scarlet v. Lucton School* p. 592

#### TRUST, BREACH OF.

By the statutes relating to Savings' Banks in operation before July, 1828, the increase of the fund or surplus, after paying the expenses of management, and the interest upon the deposits, was directed to be distributed among, or for the benefit of the depositors. By the Act 9 G. 4. c. 92., which was passed in July, 1828, to consolidate and amend the laws relating to Savings' Banks, it is enacted (s. 22.), that, within six weeks after the 20th November, 1828, the trustees, &c. shall ascertain the amount of the increased funds up to that date; and, after retaining so much thereof as might be necessary for future management, should appropriate the same in manner provided for by their respective rules and regulations made before the passing of the act; or, in the event of no provision having been made by such rules and regulations, then in such manner as the trustees, or the major part of them, assembled at any general meeting convened according to the rules, &c. shall think fit and proper.

The Arundel Savings' Bank was established in 1818; and,



in pursuance of this enactment, the increased stock or fund of that bank, up to the 20th November, 1828, was ascertained and found to amount to 742*l.* 15*s.* 11*d.* By the second of the rules, established at the first institution of the society, it was provided that no trustee, nor any person having any control in the management of the institution (except the actuary), should derive any benefit from any deposit made therein.

The trustees were owners of property in the town and county, and liable to be rated for the repairs of the bridge at Arundel. The Appellant was bridge-warden in 1828.

At a meeting of the trustees on the 11th December, 1828, it was resolved, that of the increased stock, "the sum of 100*l.* be retained for the future purposes or management of the bank; that the sum of 50*l.* be paid for arrears of rent and firing to the fund of Arundel school; and that the remainder, 592*l.* 15*s.* 11*d.*, be paid over to W. Holmes (the Appellant), and three other trustees, for the purpose of paying the expense incident to the widening the public bridge over the river at Arundel, the same being narrow and dangerous, and accidents having arisen thereupon; and, in case counsel be of opinion that the trustees are not so authorized to dispose of the money, that the same be disposed of in such manner as the trustees, or the major part of them present at the annual meeting in November, 1829, shall order. That a case for the opinion of counsel be prepared," &c. A case was prepared accordingly, and the opinion of counsel being adverse to the appropriation, an amended case was submitted to him, which produced a favourable opinion.

In the mean time another case was submitted to counsel by those who opposed the appropriation, and an opinion declaring it to be illegal was produced by the opponents at a meeting in December, 1829, and the Appellant and the other trustees were required to rescind the resolution, and to restore the fund.

On the 1st March, 1831, a bill was filed by some of the trustees against the Appellant and the other trustees, into whose names the fund had been transferred, to restrain the application, &c. The answer contended for the legality of the resolution, and stated that part of the fund had been applied to the expense of widening the bridge; and, upon a motion made for the payment of

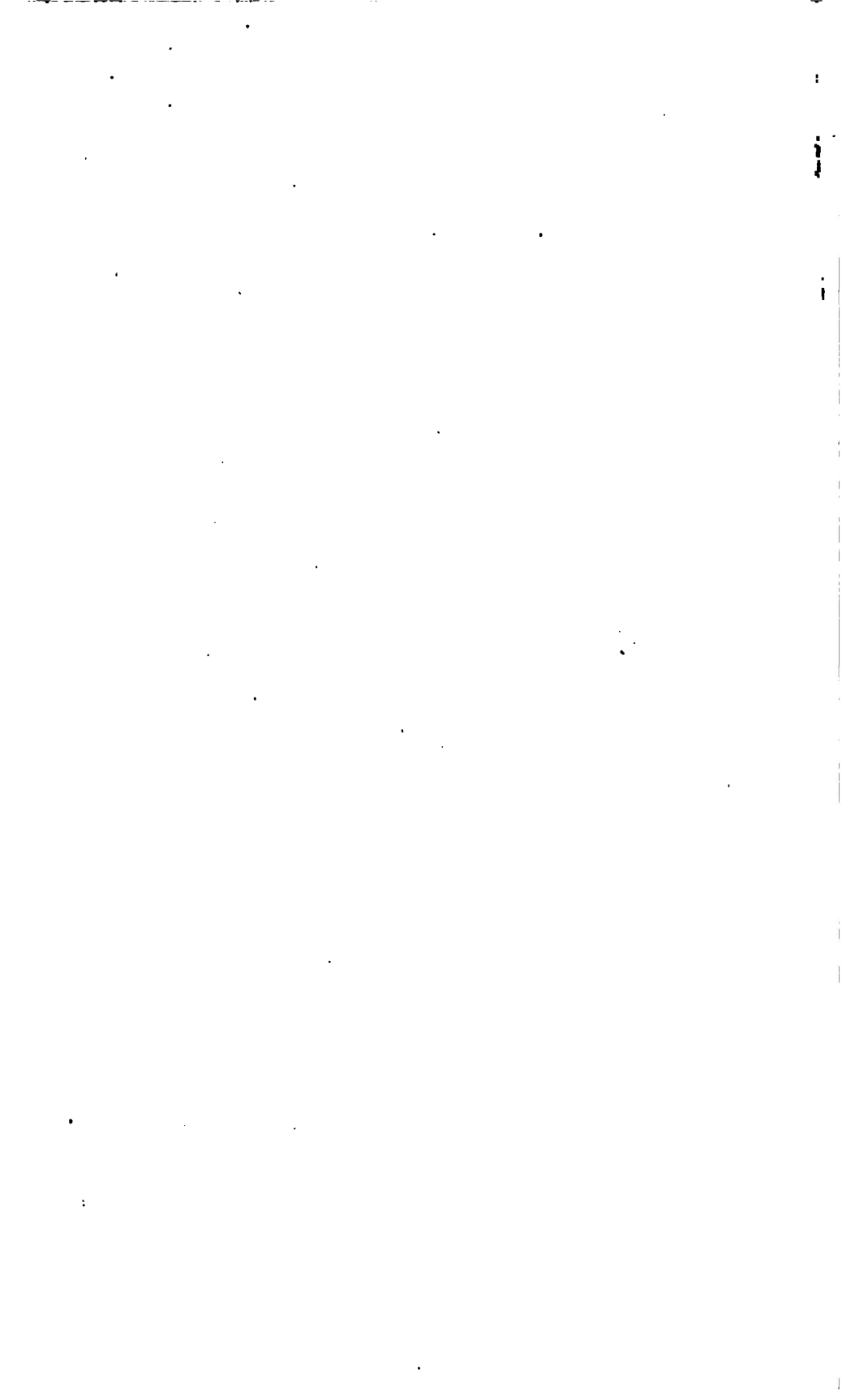
the money into court, the Appellant filed an affidavit, in which he stated that, on the 9th of March, 1831, he applied the residue of the fund, which had been transferred to him by the other Defendants, to the payment of the expenses of widening the bridge. Upon this motion it was ordered that the whole fund should be paid into court; and, upon the hearing, it was decreed that the Defendants had been guilty of a breach of trust, and were personally responsible for the misapplication of the fund, and were charged with the costs of the suit. The order and decree were affirmed, with costs, upon appeal by one of the Defendants, the others not joining in the appeal. — *Holmes v. Henty* - p. 255

#### WORDS — CONSTRUCTION.

In 1801, R. a partner in a banking concern in Ireland, applied to N. and Co. a banking-house in London, for a loan of 10,000*l.* to bring into the Irish firm as his share of the capital; which sum they advanced upon the security of four bonds for 2500*l.* each, with warrants of attorney to confess judgments in any of the courts of England and Ireland; which were accordingly entered up in the Court of King's Bench in Ireland, in the year 1803. The bonds were expressed to be for the sum "of 5000*l.* sterling," and the condition was for the payment of the sum of "2500*l.* sterling of good and lawful "money of Great Britain, with legal interest." The warrants of attorney recited the bonds in the same words. The judgments had only, the expression "5000*l.* sterling." Upon the execution of the bonds credit was given to R. in the books of N. and Co. for the sum of 10,000*l.*, of which R. being advised, he by letter dated in August, 1801, authorized N. and Co. to answer bills to the amount of 10,000*l.*, which were afterwards drawn by the Irish firm, and accepted and paid by N. and Co. Payments on account of the debt were made at various times to B. a legal agent of N. and Co. at Dublin, and he accepted and accounted for those payments as made in Irish currency. Upon a bill filed by the assignee of the debt, held, that it was payable in English currency and with English interest. — *Noel v. Rochfort* - p. 483

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